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Supreme Court of the United States

OCTOBER TERM, 1962

No. 133

DANIEL ALTON WILLIAMS, PETITIONER

vs.

EUGENE M. ZUCKERT,
SECRETARY OF THE AIR FORCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 7, 1962
CERTIORARI GRANTED MAY 21, 1962

Supreme Court of the United States

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[fol. A] IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 16345

DANIEL ALTON WILLIAMS, APPELLANT

v.

EUGENE M. ZUCKERT, as Secretary of the Department of the Air Force of the United States, JOHN W. MACY, JR., as Chairman of the United States Civil Service Commission; and BARBARA GUNDERSON and FREDERICK J. LAWTON, as members of the United States Civil Service Commission, APPELLEES

JOINT APPENDIX

[fol. 2] RELEVANT DOCKET ENTRIES

June 6—Complaint Exhibits A thru J filed.

Jan. 17—Amended complaint; c/m 1-11-61 exhibits A, B, C, D, E, F, G-1, G-2, H, I, J, (fiat). Matthews, J.

Feb. 10—Motion of defts for summary judgment on the "First Amended Complaint;" P & A; c/m 2-10-61; M.C. filed.

Feb. 23—Motion of pltff for summary judgment; c/m 2-23-61; Statement of Material Facts; P & A; M.C. filed.

Mar. 1—Opposition of defts to pltff's motion for summary judgment; supplemental P & A in support of defts motion for summary judgment; C/M 3-1-61. filed.

Mar. 10—Supplemental memorandum of P & A of pltff in support of motion for summary judgment; c/m 3-10-61. filed.

Mar. 13—Motion of defts for summary judgment; motion for summary judgment on "first amended complaint;" motion of pltff for summary judgment—all 3 motions argued and taken under advisement. (Reported by Dorothy F. Sweet). Walsh, J.

Mar. 14—Order, granting defts' motions for summary judgment and denying pltff's cross-motion for summary judgment (N), Walsh, J.

Mar. 30—Notice of appeal by pltff; Deposit by Dickstein $5.00; copy mailed to Oliver Gasch, U. S. Attorney. filed.

April 6—Cost bond on appeal of pltff with U. S. Fidelity and Guaranty Co. in the amount of $250.00, approved and filed (fiat). Tamm, J.

[fol. 3] IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1699-60

DANIEL ALTON WILLIAMS, 1830 East 39th Avenue, Denver 1, Colorado, PLAINTIFF,

v.

DUDLEY C. SHARP, Individually and as Secretary of the Department of the Air Force of the United States; ROGER W. JONES, Individually and as Chairman of the United States Civil Service Commission; BARBARA GUNDERSON and FREDERICK J. LAWTON, Individually and as members of the United States Civil Service Commission, DEFENDANTS

FIRST AMENDED COMPLAINT—Filed Jan. 17, 1961

Plaintiff, by his attorneys, for his complaint herein, alleges as follows:

1. This is an action for declaratory judgment and other equitable relief to restore plaintiff to employment in the Department of the Air Force; said action arises under the Constitution and laws of the United States and involves a matter in controversy exceeding the sum or value of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

2. Jurisdiction of the Court arises under and by virtue of Sections 11-305 and 11-306 of the District of Columbia [fol. 4] Code and Sections 1331, 1332, 2201, and 2202 of Title 28, United States Code. Jurisdiction is also based on the Fifth and Sixth Amendments of the Constitution of the United States.

3. Plaintiff is a native born citizen of the United States, a resident of the State of Colorado, and brings this action in his own right. Plaintiff is a veteran of World War II and a "veteran's preference eligible" under and by virtue of the Veteran's Preference Act of 1944, 58 Stat. 390, as amended, 5 U.S.C. Section 863.

4. Defendant Dudley C. Sharp is an individual doing business and, on information and belief, residing in the

District of Columbia, and is the Secretary of the Department of the Air Force; said defendant is sued individually and in his official capacity. Defendants Roger W. Jones, Barbara Gunderson and Frederick J. Lawton are individuals doing business and, on information and belief, residing in the District of Columbia, and are, respectively, Chairman and members of the Civil Service Commission and are sued individually and in their official capacities.

5. At all times material to this complaint and until his removal on March 12, 1959, plaintiff was employed by the Department of the Air Force as a Recreational Supervisor, GS-7, at the Air Force Academy in Colorado; plaintiff's earnings in said position and grade were in excess of Four Thousand Nine Hundred Dollars ($4,900.00) per annum. Plaintiff was a permanent Civil Service employee for a period of sixteen (16) years including a period of active military duty in the Air Force for four years beginning on October 11, 1954 and from which service he was honorably discharged.

[fol. 5] 6. On or about March 6, 1959, the defendant Sharp instituted a removal and suspension proceeding against the plaintiff, because of an alleged attempted homosexual act with an unnamed airman of the Air Police Squadron. A copy of said proposed removal and suspension of plaintiff is annexed hereto and made part hereof as "Exhibit A".

7. On March 7, 1959, plaintiff denied the charges of misconduct and his proposed suspension. Plaintiff stated that he was without knowledge or information concerning any attempted homosexual act on his part and requested a Bill of Particulars and other "related documents, affidavits and evidence" bearing upon his alleged misconduct. A copy of said document is annexed hereto and made part hereof as "Exhibit B".

8. Without affording plaintiff any specifications or particulars concerning his alleged misconduct, defendant Sharp by his Director of Civilian Personnel, suspended plaintiff from active duty and pay status on March 9, 1959. A copy of said suspension is annexed hereto and made a part hereof as "Exhibit C".

9. On March 11, 1959, defendant Sharp by his Director of Civilian Personnel, rescinded plaintiff's proposed re-

moval and suspension instituted on or about March 6, 1959 and issued a second notice proposing the removal of plaintiff from his Civil Service position because of three alleged incidents, each of which were described as "attempted homosexual assault[s]". Two of the aforesaid incidents were specified as having occurred while plaintiff was an airman in the United States Air Force and the third while plaintiff was a civilian employee of [fol. 6] the Department of the Air Force. The aforesaid notice proposed that plaintiff be suspended from "active duty and pay status" beginning no earlier than March 14, 1959, but that action in this regard would not be taken until after he had replied thereto. A copy of the second notice of removal and suspension is annexed hereto and made a part hereof as "Exhibit D".

10. The second proposed notice of suspension and removal (Exhibit D) provided, *inter alia*:

> "This letter constitutes a new thirty (30) days notice of proposed action to remove you from your position as recreation supervisor (GS-7) with the United States Air Force Academy, Colorado. This notice is issued in accordance with the provisions of Part 22 of Civil Service Regulations, and will be effective no earlier than 12 April 1959.
>
> • • • •
>
> "Because of the serious nature of the charges, and in view of the position of responsibility which you hold, it is also proposed that you be suspended from active duty and pay status during the full notice period, beginning no earlier than 14 March 1959 and ending 12 April 1959."

11. At the time of the second notice of removal and suspension and continuously since March 6, 1959, plaintiff had been prohibited and prevented from entering the Air Force Academy and performing his assigned duties at said location. On March 6, 1959 the defendant Sharp by his Provost Marshal, expelled plaintiff from the U. S. Military Reservation of the United States Air Force Academy for "undesirability". This order of expulsion is and has been in full force and effect at all times since

[fol. 7] March 6, 1959. A copy of said order of expulsion is annexed hereto and made a part hereof as "Exhibit E".

12. On March 11, 1959, plaintiff denied all of the charges and allegations contained in the second notice of suspension and removal. A copy of said denial is annexed hereto and made a part hereof as "Exhibit F".

13. At all times hereinafter mentioned and during the course of the proceedings and hearings relating to the removal and suspension of plaintiff by the Department of the Air Force and the Civil Service Commission, the three airmen who charged plaintiff with "attempted homosexual assault[s]" were under the control and command of the defendant Sharp and his subordinates. Said defendant had the power to command said airmen to appear and testify concerning their charges against plaintiff and thereby afford plaintiff the opportunity of confrontation and cross-examination.

14. At diverse times during the course of the proceedings of the Department of the Air Force and the Civil Service Commission, plaintiff requested that he be confronted by his accusers and given the opportunity to cross-examine them; *i.e.*, the three airmen located at the Air Force Academy in Colorado. The defendant Sharp refused to direct or permit the three airmen under his military control to appear and testify concerning their charges against plaintiff. Likewise, the defendants Jones, Gunderson and Lawton, also referred to herein as the defendant Commissioners, refused to require the defendant Sharp to exercise his power of command and control over these airmen so as to afford plaintiff the opportunity of confrontation and cross-examination. Instead, as [fol. 8] hereinafter alleged, defendants proceeded to find plaintiff guilty of charges of "attempted homosexual assault[s]" by the sworn and untested statements of said airmen-accusers.

15. On March 13, 1959, the defendant Sharp by his Director of Civilian Personnel suspended plaintiff, and on April 10, 1959, removed and dismissed plaintiff from his Civil Service position at the Air Force Academy. Said suspension and removal was based on the sworn statements of three airmen who charged plaintiff with "at-

tempted homosexual assault[s]" on them. Plaintiff was not confronted or afforded the opportunity to cross-examine said airmen, although the same was duly requested and their statements denied by plaintiff. Copies of the suspension and removal decisions are annexed hereto and made part hereof as "Exhibits G-1 and G-2".

16. On April 14, 1959, plaintiff appealed from his aforesaid removal and suspension by the defendant Sharp under Section 14 of the Veteran's Preference Act, 5 U.S.C. § 863. Pursuant to said appeal a so-called "hearing" was had on May 5, 1959 before the Tenth Civil Service Region which thereafter issued Findings and Recommendations dated August 14, 1959 sustaining the aforesaid action of the defendant, Sharp. Annexed hereto and made a part hereof as "Exhibit H" is a copy of the Tenth U. S. Civil Service Region's Findings and Recommendations together with a Summary of the Hearing.

17. During the course of the hearing provided by the Civil Service Region on May 5, 1959, the charges relating to "attempted homosexual assault[s]" were placed in conflict by evidence adduced by plaintiff. The Director and Appeals Examiner of the Tenth U. S. Civil Service Region [fol. 9] resolved said conflict in favor of the defendant Sharp. The express and specific basis for said resolution of conflicting evidence was:

> "'[that] it is inconceivable that three different persons on three different occasions at wide intervals of time would make fictitious accusations of homosexual attempts against them by the same person unless such attempts did in fact occur. For this reason the conflict in evidence as to whether or not Mr. Williams made the homosexual attempts as set out in the notice of proposed adverse action is resolved in favor of the U. S. Air Force Academy."

18. During the course of the hearing provided by the Civil Service Region on May 5, 1959, plaintiff claimed that he could disprove the accusations made against him of "attempted homosexual assault[s]" if he were granted the opportunity of confrontation and cross-examination of the three airmen who authored the charges upon which

the said hearing was based. Plaintiff also requested that the statements of these airmen be rejected and not be considered as evidence since the three airmen were available as witnesses but were not present because of the refusal of the defendant Sharp to require them to attend the hearing. The Tenth U. S. Civil Service Region concurred and approved of the defendant Sharp's refusal to produce these airmen and permitted plaintiff's alleged "attempted homosexual assault[s]" be determined solely on the basis of hearsay statements.

19. Upon receipt of the aforesaid Findings and Recommendations and on or about August 17, 1959 plaintiff duly appealed to the Commission's Board of Appeals and Review. A copy of said appeal is annexed hereto and made part hereof as "Exhibit I".

[fol. 10] 20. On September 28, 1959 the defendant Sharp by his director of Civilian Personnel filed a letter of opposition to the aforesaid appeal (Exhibit I) which stated, *inter alia*:

> "With reference to the inability of Mr. Williams to cross-examine key witnesses, we wish to emphasize that there was no design or intent on the part of any official of the Air Force Academy to preclude Mr. Williams from such an opportunity. These witnesses had furnished sworn statements concerning Mr. Williams' behavior on certain occasions and it was considered unnecessary to bring them to the hearing as it was felt that any testimony they could give would be repetitious. Knowing the character and reputation of the airmen who were concerned in this matter, it is firmly believed that even had the officials of the Air Force Academy deemed it necessary for them to attend, neither the counsel for Mr. Williams nor Mr. Williams could have discredited them upon cross-examination. In fact, there is a possibility that they could have made even more damaging statements about Mr. Williams' conduct and behavior."

21. On March 14, 1960 the Commission's Board of Appeals and Review affirmed the decision of its Tenth U. S. Civil Service Region. Said Board of Appeals and Review found that the evidence adduced by plaintiff

"directly contradict[ed] at least in part the evidence [statements] given against [him] by the adverse witnesses" but nevertheless concluded:

> * * * * that it is inconceivable that three persons on different occasions at wide intervals of time would make fictitious accusations of homosexual attempts against them by the same person unless such attempt did in fact occur".

A copy of the decision of the Board of Appeals and Review of the defendant Commission is annexed hereto and made part hereof as "Exhibit J".

22. The action of the defendants which prevented persons with direct knowledge concerning the facts of plaintiff's alleged "attempted homosexual assault[s]" from [fol. 11] appearing although said persons were at all times available and subject to the military command and control of the defendant Sharp was arbitrary and capricious and not in good faith. The insistance of the defendants in restricting evidence directed against plaintiff solely to hearsay statements when the authors thereof could have been produced at the hearing, confronted and cross-examined by plaintiff was arbitrary and capricious and violative of the Fifth and Sixth Amendments of the Constitution. Defendants' action in imposing the evidentiary inference that hearsay statements must be true in the face of admitted contradictions of fact because it is "inconceivable that three persons * * * would make fictitious accusations of homosexual attempts against them by the same person unless such attempts did in fact occur" was arbitrary and capricious.

23. There exists between plaintiff and defendants herein an actual controversy, and plaintiff has instituted this action for the purpose, among others, of having the action of the defendants in terminating plaintiff's employment with the Department of the Air Force, as aforesaid, declared null and void and in violation of Section 14 of the Veteran's Preference Act, 58 Stat. 476 as amended, 5 U. S. C. Section 863; in violation of the provisions and procedures of the Civil Service Commission; and the Rules and Regulations promulgated by the Department of the Air Force; and in violation of the Fifth and Sixth

Amendments to the Constitution of the United States.

[fol. 12] 24. Plaintiff has exhausted all of the remedies available to him under applicable administrative procedures and has no adequate remedy at law other than the instant action under the jurisdiction conferred by this Court.

25. By reason of the premises, plaintiff is entitled to relief against the defendants under the Federal Declaratory Judgment Act of June 14, 1934, Title 28 of the United States Code, Sections 2201 and 2202.

26. No prior application for this or any other relief has been made to this or any other court.

WHEREFORE, plaintiff demands and prays for the following relief:

1. That the action of defendants in discharging plaintiff and refusing to restore him to his position in the Department of the Air Force be declared null and void and in violation of Section 14 of the Veteran's Preference Act, 58 Stat. 390, as amended, 5 U. S. C. Section 863; and of the provisions and procedures of the Civil Service Commission; and the Rules and Regulations promulgated by the Department of the Air Force; and of the Fifth and Sixth Amendments to the United States Constitution.

2. That the action of the defendants in discharging plaintiff and in refusing to restore him to his position in the Department of the Air Force be declared null and void and illegal and that said actions be declared arbitrary, capricious, and not made in good faith.

3. That plaintiff be ordered reinstated and restored to his former position; and

[fol. 13] 4. For such action and further relief as to the Court may seem just and proper in the premises.

DICKSTEIN & SHAPIRO

By /s/ Melvin Warshaw
MELVIN WARSHAW
1411 K Street, N. W.
Washington 5, D. C.

Attorneys for Plaintiff

[fol. 14] "Exhibit A" to Complaint

UNITED STATES AIR FORCE ACADEMY
Denver, Colorado

Office of the Director of Civilian Personnel

March 6, 1959

Mr. Daniel A. Williams
607 North Spruce Street
Colorado Springs, Colorado

Dear Mr. Williams:

You are hereby given 30 days notice of proposed action to remove you from your position as Recreational Supervisor, GS-7, with the U. S. Air Force Academy, Colorado. This notice is issued in accordance with the provisions of Part 22 of Civil Service Regulations, and will be effective no earlier than 7 April 1959.

The reason for this proposed action is your misconduct as reported by the Provost Marshal of the Air Force Academy who charges you with the following incident:

Date:	11 February 1959
Location:	Colorado Springs, Colorado
Offense:	Attempted homosexual act with an airman of the Air Police Squadron, Air Force Academy, Colorado, as evidenced by signed, sworn statement on file in the Provost Marshal's office.

Because of the serious nature of the charges, and in view of the position of responsibility which you hold, it is also proposed that you be suspended from active duty and pay status during the full notice period beginning no earlier than 10 March 1959 and ending 7 April 1959.

You may reply to this letter of notice personally and in writing showing cause why the action should not be taken. You may submit affidavits and evidence in support of your reply. Your reply to the notice of proposed suspension must be made within 48 hours or no later than 0900 hours on 9 March 1959. Your reply to your notice of removal

must be made within seven (7) calendar days from the receipt of this letter. Your letters of reply must be brought or mailed to the Director of Civilian Personnel, United States Air Force Academy, Colorado.

No decision has been made or will be made to remove or suspend you until after the respective times allowed for you to reply. Whether you reply or not, you will be given written notices of final decision. You may bring any [fol. 15] questions you have concerning this action to Mr. Arthur J. Peterson, Personnel Advisor, Building 8034, Telephone GR 2-2134.

Sincerely,

/s/ James E. Dodson
JAMES E. DODSON
Director of Civilian Personnel

[fol. 16] "EXHIBIT B" TO COMPLAINT

Colorado Springs, Colorado
March 7, 1959

Mr. James E. Dodson
Director of Civilian Personnel
United States Air Force Academy, Colo

Dear Mr. Dodson:

I categorically deny the allegations and charges made to your office by the Provost Marshal's office of the United States Air Force Academy.

I request "Bill of Particulars" giving all facts, evidence and a copy of each statement on file in the Provost Marshal's office and evidence that was also transmitted to your office.

I cannot answer these allegations of attempted homosexual acts with an airman of the Air Police Squadron unless I know what I did, where I did it, and to whom I did the alleged act.

This is in compliance with the 48 hour deadline. I do not feel that my suspension from duty is justified on the basis of the allegations contained in your letter of March 6, 1959 delivered to me by Mr. Arthur J. Peterson, Personnel Advisor.

I do not feel that my expulsion from United States Military Reservations effective 10 March 1959 is justified.

I have been tried and found guilty per this expulsion act delivered by the Provost Marshal's office in the Name of the Superintendent on 6 March 1959.

I will answer all charges and allegations immediately upon receipt of the "Bill of Particulars" and other related documents, affidavits and evidence that I have committed such an act or attempted as stated in the letter.

Sincerely,

607 N. Spruce Street
Colorado Springs, Colo.

Daniel A. Williams
DANIEL A. WILLIAMS

I acknowledge receipt of two copies of this letter on 9 March 1959

[fol. 17] "EXHIBIT C" TO COMPLAINT

UNITED STATES AIR FORCE ACADEMY
Denver, Colorado

Office of the Director of Civilian Personnel

9 March 1959

Mr. Daniel A. Williams
605 North Spruce Street
Colorado Springs, Colorado

Dear Mr. Williams:

You are hereby notified that final decision has been made to suspend you from duty and pay for the period beginning 10 March 1959 and ending at the close of business 7 April 1959. This decision was made in accordance with the provisions of Part 22, Civil Service Regulations.

A letter of notice of proposed suspension and removal, dated 6 March 1959, was delivered to you personally on that date. That letter stated in detail the reason for your proposed suspension and removal, namely that on 11 February 1959 you attempted a homosexual act with an airman of the Air Police Squadron, U. S. Air Force Academy, Colorado. You were afforded an opportunity to reply to your notice of suspension within 48 hours from 6 March 1959 to your notice of removal within seven (7) calendar days from the date of receipt of that letter and to show cause in your reply why the action should not be taken, supported by affidavits and evidence in support of your answer.

You have replied to the notice of suspension by letter dated 7 March 1959 and this letter has been given careful consideration. Since in that letter you failed to answer the charges with sufficient evidence to support your statement, your suspension is considered necessary to the best interests of the service. You may appeal this decision under the Air Force grievance procedure, established by Chapter E 2, Air Force Personnel Manual 40-1. Appeal must be made in writing within thirty (30) calendar days of the effective date of your suspension. This appeal

should be addressed to the Superintendent, U. S. Air Force Academy, ATTN: Director of Civilian Personnel.

You may bring any questions you have concerning this [fol. 18] action to Mr. Arthur J. Peterson, Personnel Advisor, Building 8034, Telephone GRanite 2-2134.

Sincerely,

/s/ James E. Dodson
JAMES E. DODSON
Director of Civilian Personnel

[fol. 19] "EXHIBIT D" TO COMPLAINT

UNITED STATES AIR FORCE ACADEMY
Denver, Colorado

Office of the Director of Civilian Personnel

11 March 1959

Mr. Daniel A. Williams
607 North Spruce Street
Colorado Springs, Colorado

Dear Mr. Williams:

You are hereby informed that our letter dated 6 March 1959 proposing your removal is rescinded. This letter constitutes a new thirty (30) days notice of proposed action to remove you from your position as Recreation Supervisor, GS-7, with the United States Air Force Academy, Colorado. This notice is issued in accordance with the provisions of Part 22 of Civil Service Regulations, and will be effective no earlier than 12 April 1959.

The reason for this proposed action is your misconduct on the following occasions:

Date	Location	Offense
On or about 30 November 1957	Room 403, Colorado Hotel Denver, Colorado	Attempted homosexual assault upon Airman First Class Robert H. Carwithen
On or about 10 May 1958	On roadside between Blackhawk, Colorado and Lowry AFB, Colorado	Attempted homosexual assault upon SSGT Alton Tyler
11 February 1959	607 North Spruce, Colorado Springs, Colorado	Attempted homosexual assault upon Airman Second Class Patrick J. Ryan

In addition to the above acts of misconduct, you are also charged with willfully damaging Government property. Specifically, on 4 March 1959, at 1835 hours, you were found damaging a Government typewriter with the use of a paper clip and a chrome name plate in an attempt to scrape the face of the type and bend the keys. This type-

writer was located in the Service Club, U. S. Air Force Academy, Colorado.

[fol. 20] Because of the serious nature of the charges; and in view of the position of responsibility which you hold, it is also proposed that you be suspended from active duty and pay status during the full notice period, beginning no earlier than 14 March 1959, and ending 12 April 1959.

You may reply to this letter of notice personally and in writing showing cause why the action should not be taken. You may submit affidavits and evidence in support of your reply. Your reply to the notice of proposed suspension must be made within twenty-four (24) hours or no later than 0900 hours 13 March 1959. Your duty hours for 12 and 13 March 1959 will be 0745 to 1615 hours, during which period you will be carried on administrative leave. Your reply to your notice of removal must be made within seven (7) calendar days from the receipt of this letter. Your letters of reply must be brought or mailed to the Director of Civilian Personnel, United States Air Force Academy, Colorado.

No decision has been made or will be made to remove or suspend you until after the respective times allowed you for reply. Whether you reply or not, you will be given a written notice of final decision. You may bring any questions you have concerning this action to Mr. Arthur J. Peterson, Personnel Advisor, Building 8034, Telephone GRanite 2-2134.

A copy of the Notification of Personnel Action, SF-50, cancelling the suspension which is rescinded by this letter is inclosed.

Sincerely,

/s/ James E. Dodson
JAMES E. DODSON
Director of Civilian Personnel

1 Incl
SF-50

[fol. 21] "EXHIBIT E" TO COMPLAINT

UNITED STATES AIR FORCE ACADEMY
Denver, Colorado

Office of the Director of Civilian Personnel

6 March 1959

Certified to be a true copy:

SGPAQ-1

SUBJECT: Expulsion from United States Military Reservation

To: Daniel Alton Williams
607 North Spruce Street
Colorado Springs, Colorado

1. You are hereby notified that you are prohibited to enter or be found, day or night, within the limits of the U. S. Military Reservation of United States Air Force Academy, Colorado for undesirability under the provisions of the following law:

> "Title 18, Section 1382, USC, Entering MILITARY, NAVAL, OR COAST GUARD PROPERTY. Whoever within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever re-enters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to re-enter by any officer or person in command or charge thereof—
>
> Shall be fined not more than $500 or imprisoned not more than six months, or both." (June 25, 1948, Ch. 645, 1, 62 Stat. 765, off Sep 1, 1948).

2. You are hereby ordered not to enter the U. S. Military Reservation of United States Air Force Academy, Colorado for an indefinite period, beginning 10 March 1959.

3. You are further notified that, should you be apprehended on this U. S. Military Reservation, you will be arrested and detained by the military authorities for delivery, without delay, to the proper U. S. Marshal.

[fol. 22] For the Superintendent

Roger P. Fox
Captain, USAF.
Provost Marshal

cc: AFDCB (Colo Wyo Area)
PM—Fits Army Hosp
PM—Lowry AFB
PM—Ent AFB
PM—Ft. Carson
PM—F Warren AFB
PM—Buckley Naval Sta
PM—Rocky Mountain Arsenal
PM—AFAFC

[fol. 23] "EXHIBIT F" TO COMPLAINT

Colorado Springs, Colorado
March 11, 1959

Mr. James E. Dodson
Director of Civilian Personnel
United States Air Force Academy, Colorado

Dear Mr. Dodson:

In answer to your letter of 11 March 1959 in which a proposal of suspension is proposed along with a thirty day notice for removal on the basis of allegations contained therein, I answer the 24 hour notice herewith.

On the charges of A/1C Robert H. Carwithen, I called Mr. Gallamore, Chief, 14th District of the Office of Special Investigations, Lowry AFB, Colorado, around early May 1958. I called Mr. Gallamore after two WAFs, unknown by name to me, approached me in Lowry AFB Cafeteria #1 and said that they had heard my name mentioned in the OSI's office while they were being questioned in regards to activities dealing with sex deviates. These girls explained to me that my full name was not known and that I should not say anything in order to prevent the OSI finding me. The next morning I called Mr. Gallamore and told him of the incident and he asked me to come over to his office to talk with the OSI agent handling the case.

I went to the OSI office as directed and talked to two agents. I don't recall their names but it is on record in the 14th Dist. OSI's office on the Carwithen case. I answered all questions forthwith and was told at the end of the questioning that I was not wanted for questioning by the OSI. I left the OSI office and resumed my duties at the Air Force Academy.

Prior to this questioning by the OSI, S/Sgt Alton Tyler accompanied me to Central City for a round of the sights there. We were having fun singing at one of the local taverns where they had a Honky Tonk Piano player. Sgt Tyler struck up a conversation with two attractive young ladies while I was singing a solo at the piano. He intro-

duced me to the girls after I finished singing. We talked for a while and the girls invited us to a tavern in Blackhawk, Colo. I did not accompany them, but Sgt Tyler did. I remained to sing more around the piano and promised to come to Blackhawk later.

I went to Jenny's Inn, the Blackhawk Tavern, about an hour later. I found many girls there and for a while I saw no men. One of the girls that Sgt Tyler had introduced me to earlier signaled me to the rear of the tavern. I saw many couples dancing, but they were all girls. I finally [fol. 24] located Sgt Tyler sitting with one of the WAFS that later approached me in the Lowry Cafeteria. I joined them and talked for a while. I was very uncomfortable because one of the girls indicated that men were not wanted. I soon found a way to excuse myself and went outside to my car alone. Sgt Tyler joined me sometime later. I was drinking a beer and told him that I would leave for Denver soon, or as soon as I finished the beer. He indicated that he was ready to go. Sgt Tyler mentioned the strange actions of the ladies inside the tavern and I agreed that things did look funny.

Sgt Tyler began to tell me his domestic troubles. These were from no sex life with his wife to outright brutal treatment at the hands of his wife. He pulled up his trouser legs to prove his point. There were scars that had not healed. Sgt Tyler broke down and wept violently for quite a while. He put his head in my lap and cried until I could finally talk him into calmness. We left for Lowry AFB and talked very little all the way to the Academy. I was doing the driving. There was no stopping and no discussion of sex. When we arrived at the Air Force Academy Sgt Tyler said that he did not have money for food. I gave him $5.00 as a loan, to carry him over until payday. He said that he could never get the $5.00 ahead to repay me to this day. To the best of my knowledge we remained friends to this day. I mentioned Sgt Tyler's breakdown to A/2C Robert J. Harris and said that I hope Sgt Tyler's domestic problems would straighten out. Sgt Tyler kept me informed as to his domestic relations and the part his Commanding Officer and the First Sergeant played in

getting by and his wife back together. They have or are having and addition to the family per Sgt Tyler's last report. I have at no time entertained the thought of having sexual relations with Sgt Tyler as charged some 10 months later in his allegations.

11 August 1958 the Robert Carwithen homosexual charge was made known, or attempted homosexual charge, to me and to my Commanding Officer. I was called to the CO's office to face two OSI agents. I do not remember their names for I was never given anything in writing. My room was searched as well as my automobile. I was accompained by my Commanding Officer to the OSI's office for interrogation later in the afternoon of 11 Aug 58. I gave a statement, signed it and agreed to take a lie detector test. I was recalled to take the lie test a few days later. I had studied up on the legal aspects of the test. I refused to take the test pending a talk with my C.O. My C.O. said that he would take the test if he were in my shoes. A lie detector test cannot be used as defense or prosecution—so one takes it to satisfy the curosity of the parties involved. I later took the test. I don't know the results for I was never told. I was being treated by a physician for a nervous condition and still am being treated to this day. The OSI found no homosexual activities in my life nor in my contacts, and I was told that the [fol. 25] case was being closed and the results would be given to my C.O. This case was aired with the Chief of Staff prior to my being employed as Assistant Service Club Director. I still deny the charges made some 9 months later and now over a year later—of an alleged incident occuring during the sharing a room with twin beds at the Colorado Hotel. A/1C Robert Carwithen continued to be friends with me during his entire stay at Lowry AFB. He often borrowed my car to take his girl to work during bad weather. I never met her until the incident in the cafeteria but she was one of the WAFs caught in the sex deviate act and discharged from the Air Force by her own admission. Airmen Carwithen obviously took revenge for my calling the OSI. We met due to Carwithen's desire to appear in one or some of my stage shows. He played the harmonica.

A/2C Patrick J. Ryan approached me in late Jan 1959, while I was on duty in the Service Club of the Air Force Academy. He used A/2C David Lundquist and A/1C Edward Miller, Special Services, and Air Police Squadron respectively, as having referred him to me for help in getting contacts in Denver for selling Presto Pride waterless cookware. I agreed that I would assist him in anyway possible.

Airman Ryan complained of having feet trouble, and said that he would soon get a light duty slip and have time during evening hours to work on plans for his proposed project.

Miss Dorothy Spann invited a group of us to a party at her home one Saturday evening. A/2C Ryan heard about it and said that he would like to go. He was on duty but managed to get off for the party. He never knew it, but that was the first knowledge I got of his being attached to the Investigation Dept of the Air Police Squadron. Air Policemen just don't ask to be relieved from duty in order to attend a party. I got a phone call confirming what I already knew about Airman Ryan's duties. I had nothing to hide and so I continued to inform him of forthcoming events.

A/2C Ryan called me while I was on duty at the Service Club on or about 11 Feb 59. He stated that he wanted to see me after I got off duty; and that he wanted to come to my home. I told him that I didn't get off duty until 10:30 PM and that it would be well toward 11 PM when I arrived home. He said that he still wanted to stop at my home since he was already downtown Colorado Springs.

I had already expressed fears of strange desires on the part of A/2C Ryan to A/2C Curtis L. Stevens. Airman Stevens defended A/2C Ryan and said that I should help Airman Ryan sell his Presto Pride if possible. Airman Ryan had made a demonstration of his Presto Pride at my home on the night of Miss Spann's party. A/2C Royce [fol. 26] Colon, A/2C Curtis L. Stevens were present during this demonstration.

I asked A/2C Curtis L. Steven and A/3C Robert J. Harris to accompany me home. I still had misgivings about the sexual intentions of Airman Ryan. Airman Ryan called again just before Service Club closing time to see if it would still be all right for him to come over to my house. I said it would be ok. I did not tell him that there would be other people present.

I had had a flyer prepared for mailing and was considering adding an extra line across the bottom of the page advertising Ryan's Presto Pride cookware.

Airmen Stevens and Harris accompanied me home, arriving there around 11:00 PM. Airman Ryan called me home around 11:15 PM and asked if he could come over. I said that it was all right. Ryan looked quite disappointed when he arrived and saw that there were other people present.

I had poured drinks for those present and after Ryan took off his coat and was seated, I asked him if he wanted something to drink and he answered that he did. (I was not aware of his age until 22 Feb 59 in Denver)

Ryan told us that he had spent the day at Fort Carson obtaining a light duty slip and that his legs and feet hurt terribly.

We all settled down to listening to records and having a general bull session.

The time passed rapidly and A/2C Stevens remarked that he had to get up to go to work and that he would have to call it a night. I immediately asked Airmen Stevens and Harris to stay awhile longer and not to go at least for a while. They pleaded lateness of the hour and got ready to leave. Airman Ryan said that he did not have to go to work and wanted to stay longer. It was nearly 1 PM at that time, but Ryan pleaded that he wanted to talk business.

I let Airmen Harris and Stevens out the door and remained on the far side of the divan bed that was open and being used for seating. Airman Ryan soon complained of leg and feet pains and asked if he could stretch out on

the side of the bed nearest him. I said that he could and offered to rub the painful areas with a liniment that Dr. C. H. Arnold had recently prescribed for the bruises I suffered in the auto-truck accident on 21 Jan 59. Ryan said that just massaging would help. I began to massage the painful feet and legs, as proclaimed by Ryan. Airman Ryan pulled off a sweat shirt type topping and T under shirt and asked me if I would massage his neck and shoulders. He claimed fatigue due to the long wait at Fort Carson Army Hospital that day. When I finished massaging Airman Ryan, I asked him if he felt ok and [fol. 27] ready to drive back to the base? He said that he was feeling better and could drive to the base. It was well past 2 AM by the time Ryan finally left my house. I called him the next day to see if he felt better and to see if he arrived on the base all right. I also told him that I had the Presto Pride line added to the flyer that I would mail out to prospective customers.

I saw Airman Ryan on Friday, 13 Feb 59, and gave him copies of the flyer. Ryan asked me if I were going to the Cadet party in Denver on 21 Feb 59. I said that I may go—nothing definite since I had no automobile due to the accident. Ryan offered to drive me to Denver for the Cadet Party after I finished duty on the night of 21 Feb 59. I said that we'll see how the work situation developed. I later asked A/2C Carl Saganski of Special Services to go to the party and to drive his car and that if we all could not stay in the same room in single beds—to please share a room with me. I did not tell him that I did not trust the emotions of Airman Ryan. We all three went to Denver and stayed at the Colorado Hotel after the party. Ryan stayed in a room alone while Saganski and I shared a twin bed furnished room together.

A/2C Ryan kept insisting on my having a party so he could give a Presto Pride demonstration. I decided to have a party on 28 Feb 59. I only let a few people know that the affair would be a birthday party for Cadet Joseph DeSantis, 1st classman of the Cadet Wing, 6th Squadron. I kept the secret from most of the guests until I arrived home from work on the night of 28 Feb 59. A/2C Patrick

J. Ryan was among the guests present. There were over 50 people attending the party.

I saw A/2C Ryan two or three times after the night of the party and he was complaining about Capt Fox jumping him for leaking investigation secrets. One of his secrets regarded Mrs. DeStuet, another involved Capt Ryan and Capt Fox's visit to the USO, and another involved the records of Airman Ruda. These were all common gossip in the Airmen's Dining Hall by this time—thanks to Airman Ryan.

The typewriter incident in the Service Club office was not one of willful damage. I was not caught doing anything. I did what I did in full view from beginning to end of A2c Patrick J. Ryan, AP Investigator, A/2C John Dorsey, Service Club Staff, and A/2C Charles Templeton, Personnel Affairs, 7625th Support Group. The whole affair was one of a joke over the ROTC WONDERBOY bit the investigators had been typing earlier in the day. I typed on the typewriter later and I know that it was not damaged. I used the paper clip only to remover ribbon carbon out of a few keys. I had just had the typewriter worked on [fol. 28] earlier that week. I think it was worked on that day.

SUMMARY

I categorically deny all these charges and allegations.

#1 Carwithen settles a revenge over my talking to the OSI involving his girl friend.

#2 S/Sgt Alton Tyler probably wanted sexual activity and none occured. Why didn't he as an NCO make a report to the Commanding Officer? I would have just as I called Mr. Gallamore, Chief of the OSI, and I was only an Airman First Class. He could certainly have the $5.00 without being an enemy.

#3 A/2C Patrick J. Ryan had to say something to show that he deserved to remain an investigator. He had leaked all the information on current investigation until it was common gossip in the Airmen's Dining Hall. He had managed to get to outsit other guests in my house just

once, but that once was enough to accuse. This provided an opportunity to use his AIR POWER Powers of accusing! It is now up to me to disprove.

#4 I never damaged the typewriter, it types perfectly, at least it did the night of 4 Feb 59.

I will call for character witnesses as long as my attorney needs them and I will work to clear my name if it takes me the rest of my natural life to do so. I feel so strongly about this until I will have no public shame over these allegations.

I have worked too hard and long in the Air Force Academy for someone to drum up charges of this nature on me. Mr. Arthur J. Peterson, Personnel Advisor, Civilian Personnel has been aware of my problems since they started on 14 Oct 58.

I have not been welcomed on my job, racially, workmanship, ability or any other way. I have been trying desperately to find another job. If this is the Rack I am to be put in, I feel that it is unfair, unwarranted, and wholly without foundation of fact. I am trying to define what attempted homosexual might be in the minds of those making the accusations. If they wanted this type of act and did not get it, then the mere touching of the body could mean an attempt to them.

I say that these allegations are wholly without foundation.

[fol. 29] The late Senator McCarthy should serve as a lesson to most Americans on the accusing side of life, but apparently it did not.

I can produce over three hundred men in the Academy and Denver area that I have been in close quarters to testify that I have never made any proposal, advance or otherwise ... on a homosexual basis.

I have rendered personal service to the Academy personnel to a point that probably seemed silly to some people. I have gotten Mrs. Patsy Purse out of her bed at 11 PM to get an Airman and his family a place to live. She is a realtor at 400 Fulton Street, Aurora, Colorado. I got the apartment for the man and his family.

I have never turned anyone away who asked for my help. I was left an orphan and people helped me, this I never have forgotten.

Your letter says that no decision has been made to suspend or remove me, pending my answer to these charges. This is my answer to the suspension, and I promise to meet the 7 day deadline on the removal with witnesses, statements and anything else that would have a bearing on the situation.

Sincerely,

/s/ Daniel A. Williams
DANIEL A. WILLIAMS

This is to acknowledge receipt of two copies of this letter.

/s/ Arthur J. Peterson
Date 3/13/59

fol. 30] "EXHIBIT G-1" TO COMPLAINT

UNITED STATES AIR FORCE ACADEMY,
Colorado

Office of the Director of Civilian Personnel

13 March 1959

Via Certified Mail,
Return Receipt Requested

Mr. Daniel A. Williams
607 North Spruce Street
Colorado Springs, Colorado

Dear Mr. Williams:

You are hereby notified that final decision has been made to suspend you from duty and pay for the period beginning 14 March 1959 and ending at the close of business 12 April 1959. This notice of decision is in accordance with the provisions of Parts 9 and 22 of the Civil Service Regulations.

A letter of notice of proposed suspension and removal, dated 11 March 1959, was delivered to you personally on 12 March 1959. That letter stated in detail the reason for your proposed suspension and removal; namely, misconduct on the following charges:

Date	Location	Offense
On or about 30 November 1957	Room 403, Colorado Hotel Denver, Colorado	Attempted homosexual assault upon Airman First Class Robert H. Carwithen
On or about 10 May 1959	On roadside between Blackhawk, Colorado and Lowry AFB, Colorado	Attempted homosexual assault upon SSGT Alton Tyler
11 February 1959	607 North Spruce Street Colorado Springs, Colorado	Attempted homosexual assault upon Airman Second Class Patrick J. Ryan

In addition to the above acts of misconduct, you were also charged with willfully damaging Government property. Specifically, on 4 March 1959, at 1835 hours, you were found damaging a Government typewriter with the use of

a paper clip and a chrome name plate in an attempt to scrape the face of the type and bend the keys. This typewriter was located in the Service Club, U. S. Air Force Academy, Colorado.

[fol. 31] You were afforded an opportunity to reply to your notice of proposed suspension within twenty-four (24) hours from 12 March 1959 and to the notice of removal within seven (7) calendar days from the date of receipt of that letter, and to show cause in your reply why the action should not be taken, supported by affidavits and evidence.

You have replied to the notice of suspension by letter dated 11 March 1959 and this letter has been given careful consideration. Since in that letter you failed to answer the charges with sufficient evidence to support your statement, your suspension is considered necessary to the best interests of the service. You may appeal this decision under the Air Force grievance procedure established by Chapter E 2, Air Force Personnel Manual 40-1. Appeal must be made in writing within thirty (30) calendar days of the effective date of your suspension. This appeal should be addressed to the Superintendent, U. S. Air Force Academy, Attn: Director of Civilian Personnel.

You may also appeal this decision to the Director, Tenth U. S. Civil Service Region, Denver Federal Center, Denver, Colorado, within ten (10) calendar days after the effective date of your suspension, under the provisions of Section 9.106 of the Civil Service Regulations, if you feel that the procedure prescribed by the Commission has not been followed.

You may bring any questions you have concerning this action to Mr. Authur J. Peterson, Personnel Advisor, Building 8034, Telephone GRanite 2-2134.

Sincerely,

/s/ Josephine L. Dillion

(for) James E. Dodson
Director of Civilian Personnel.

(61. 32) "EXHIBIT G-2" TO COMPLAINT

UNITED STATES AIR FORCE ACADEMY
Colorado

Office of the Civilian Personnel Officer

10 Apr 1959

SPECIAL DELIVERY—CERTIFIED MAIL

Mr. Daniel A. Williams
607 North Spruce Street
Colorado Springs, Colorado

Dear Mr. Williams:

You are hereby notified that a final decision has been made to remove you from the position of Recreational Supervisor, GS-118-7, at the United States Air Force Academy. This decision is made in accordance with the provisions of Part 22 of the Civil Service Regulations and will be effective at the close of business 12 April 1959.

A letter dated 11 March 1959 proposing your removal was delivered to you personally on 12 March 1959. That letter stated in detail that the reasons for your removal were your misconduct and willful damage of government property. Specifically, with respect to your misconduct, you were charged as follows:

Date	Location	Offense
On or about 30 November 1957	Room 403, Colorado Hotel Denver, Colorado	Attempted homosexual act upon Airman First Class Robert H. Carwithen
On or about 10 May 1958	On roadside between Blackhawk, Colorado and Lowry AFB, Colorado	Attempted homosexual act upon SSGT Alton Tyler
11 February 1959	607 No. Spruce Street Colorado Springs, Colorado	Attempted homosexual act upon Airman Second Class Patrick J. Ryan

In addition, you were charged with the willful damage to government property. Specifically, on 4 March 1959 you were found damaging an Air Force Academy typewriter

located in the Service Club when you scraped and defaced the type and bent the typewriter keys.

In your letter of notice you were afforded an opportunity to reply personally and in writing to your letter [Vol. 33] of proposed action. Careful consideration has been given to your letters of reply dated 11 March 1959 and 16 March 1959. However, it has been determined that you have failed to give sufficient reasons and evidence in support of your answer to the charges. For this reason and since all of the charges for which you are being removed are of such serious nature as to reflect discredit on the Air Force Academy it has been determined that your removal is in the best interest of the service.

You may appeal this decision under the Air Force grievance procedures established by Air Force Manual 40-1, Chapter E2. Appeal must be made in writing within thirty (30) calendar days following the effective date of your removal. Such appeal should be addressed to the Superintendent, United States Air Force Academy, Attention: Civilian Personnel Officer.

As a preference eligible, you also have the right to appeal this decision under Section 14 of the Veterans Preference Act. Such appeal must be submitted to the Director, Tenth U. S. Civil Service Region, Denver, Federal Center, Denver, Colorado, at any time after receipt of this letter but no later than ten (10) calendar days after the effective date of your removal. It should be understood, however, that if an appeal is accepted by the Civil Service Commission, no future appeal of your removal may be made under the Air Force grievance procedure and any action on any appeal you may have already made will cease.

If you are interested in further employment with the Federal government, you may submit to the Director, Tenth U. S. Civil Service Commission, a sworn statement supporting in detail the facts of your case. The Civil Service Commission, within its discretion, may make such investigation as it considers necessary to determine your eligibility for further Federal employment insofar as fit-

ness is concerned. This statement must be submitted to the Civil Service Commission within six (6) months from the date of your separation.

You may bring any questions you have concerning your removal to Mr. Arthur J. Peterson, Personnel Advisor, Building 8034, Telephone GRanite 2-2134.

Sincerely,

/s/ James E. Dodson
JAMES E. DODSON
Civilian Personnel Officer

Incl
SF-50

[fol. 34] "EXHIBIT H" TO COMPLAINT

United States Civil Service Commission

3:CWH:rc

TENTH UNITED STATES CIVIL SERVICE REGION
Comprising Colorado, Arizona, New Mexico, Utah, Wyoming

Office of the Director, Denver, Colo.

August 14, 1959

Mr. Daniel A. Williams
P. O. Box 1291
Denver, Colorado

APPEAL OF: Daniel A. Williams
AGENCY: USAF Academy

Dear Sir:

Transmitted is a copy of the findings and recommendations in the above case. The appeal was considered and adjudicated under Section 14 of the Veterans' Preference Act of 1944.

Sincerely yours,

s/ Walter E. Elder
WALTER E. ELDER
Director

Enclosure
Analytical Memorandum
Summary of Hearing

[fol. 35]

UNITED STATES CIVIL SERVICE COMMISSION
TENTH U. S. CIVIL SERVICE REGION
DENVER 25, COLORADO

APPEAL OF DANIEL A. WILLIAMS UNDER SECTION 14 OF THE VETERANS' PREFERENCE ACT OF 1944, AS AMENDED

PART I, INTRODUCTION

Under date of April 14, 1959, Mr. Irving P. Andrews, Attorney-at Law, 2130 Downing Street, Denver, Colorado, submitted a letter to the Director, Tenth U. S. Civil Service Region, appealing on behalf of Daniel A. Williams the action of the Department of the Air Force, United States Air Force Academy, removing Mr. Williams from the position of Recreation Supervisor (Social Activities and Services), GS-7, $4980 per annum.

PART II, BASIS FOR ACCEPTANCE OF THE APPEAL

On the basis of Certificate of Honorable Discharge showing that Mr. Williams served on active military duty in the United States Navy from October 4, 1950, to May 30, 1953, and the United States Air Force from October 11, 1954, to October 10, 1958, it was determined that he is a preference eligible. The official personnel records maintained by the United States Air Force Academy show that effective October 13, 1958, Mr. Williams received a Reinstatement as a Career employee to the position of Recreation Supervisor, GS-7. Mr. Williams received competitive status on July 5, 1948, when he was serving as a Storekeeper, CAF-3, with the Department of the Navy. The records indicate that Mr. Williams had completed a probationary period at the time of his removal from the position of Recreation Supervisor, GS-7. Removal is an adverse action within the meaning of that term as it is used in Section 14 of the Veterans' Preference Act of 1944, as amended. Mr. Andrews submitted the appeal on behalf of Mr. Williams under date of April 14, 1959, which was within ten (10) days of April 12, 1959, the effective date

of the removal action. On the basis of the foregoing facts it was concluded that Mr. Williams' appeal is within the scope of Section 14 of the Veterans' Preference Act of 1944, as amended, and it was accepted for investigation and adjudication.

PART III. EXAMINATION OF PROCEDURES

On March 12, 1959, Mr. Williams received a written notice signed by James E. Dodson, Director of Civilian Personnel, U. S. Air Force Academy, informing him that [fol. 36] it was proposed to remove him from the position of Recreation Supervisor, GS-7, for misconduct. The general charge was set out in more detail by alleging approximate dates, places, and individuals on whom Mr. Williams had attempted homosexual assaults. The notice also charged Mr. Williams with willfully damaging a government typewriter. In addition to informing Mr. Williams of a proposal to remove him the notice of proposed adverse action contained a notice of proposed suspension from March 14, 1959, through April 12, 1959. Mr. Williams was given the opportunity to reply personally and in writing to both the proposal of suspension and the proposal of removal. Under date of March 11, 1959, Mr. Williams made a written reply to the proposed suspension and removal. The record indicates that Mr. Williams' reply was considered but a determination made that he should be suspended beginning March 14, 1959, through April 12, 1959, and removed effective April 12, 1959. A written notice of decision on the suspension action signed by Josephine L. Dillion, for James E. Dodson, Civilian Personnel Officer, was issued on March 13, 1959, and a notice of decision on the removal action signed by James E. Dodson, Civilian Personnel Officer, was issued on April 10, 1959. The nature of the offenses on which the U. S. Air Force Academy based the removal action justified the suspension of Mr. Williams during the notice period. Consequently the U. S. Air Force Academy complied with the procedural requirements of Section 14 of the Veterans' Preference Act of 1944, as amended, and Part 22 of the Civil Service Commission Regulations in effecting the removal of Mr. Williams.

PART IV. DEVELOPMENT OF THE EVIDENCE

Investigation of the appeal was conducted by a representative of the U. S. Civil Service Commission at Denver, Aurora, and Colorado Springs, Colorado, intermittently between April 16 and 30, 1959. The case was scheduled for formal hearing in the Tenth Regional Office of the Commission on May 5, 1959. Mr. Williams appeared personally and with his duly designated attorney, Mr. Irving P. Andrews. The U. S. Air Force Academy was represented at the hearing by Josephine L. Dillion, Chief, Placement and Employee Management Relations Division, and Roger P. Fox, Captain, USAF, Provost Marshal.

PART V. THE CHARGES AND ANALYSIS OF EVIDENCE

The U. S. Air Force Academy based its action to remove Mr. Williams from his position on a charge of misconduct consisting of the following alleged offenses:

(1) On or about November 30, 1957, in Room 403 of the Colorado Hotel, Denver, Colorado, Mr. Williams attempted homosexual assault upon Airman First Class Robert N. Carwithen;

[fol. 37] (2) On or about May 10, 1958, on the roadside between Blackhawk, Colorado, and Lowry Air Force Base Mr. Williams attempted homosexual assault upon Staff Sergeant Alton Tyler;

(3) On February 11, 1959, at 607 North Spruce Street, Colorado Springs, Colorado, Mr. Williams attempted homosexual assault upon Airman Second Class Patrick J. Ryan;

(4) On March 4, 1959, Mr. Williams willfully damaged a Government typewriter.

Under dates of March 7 and March 11, 1959, Mr. Williams submitted written replies to the notice of proposed adverse action in which he denied the charges made against him. In the reply dated March 11, 1959, which was incorporated by reference in an affidavit executed on April 23, 1959, Mr. Williams reviewed his associations with Airman First Class Robert Carwithen, Staff Sergeant Alton Tyler, and Airman Second Class Patrick J. Ryan, and related his version of what transpired on the

occasions of the alleged attempted homosexual assaults. Mr. Williams attributed the accusations of Airman Carwithen to revenge because he (Williams) had talked to the Office of Special Investigations about Carwithen's girl friend. The appellant stated that Staff Sergeant Alton Tyler probably wanted sexual activity and none occurred and that Airman Second Class Patrick J. Ryan had to say something to show that he deserved to remain an investigator. Mr. Williams specifically denied that he had damaged a Government typewriter and stated that the typewriter typed perfectly on the night of February 4, 1959.

In an affidavit dated April 28, 1959, Mr. Williams took exception to the Civil Service Commission giving consideration to the charges of the alleged homosexual assaults in 1957 or May 10, 1958, because those charges related to offenses that allegedly occurred prior to his employment as a civilian employee of the United States Air Force Academy. The appellant testified in substance that such charges had been fully investigated and found insufficient to warrant court martial procedures prior to his Honorable Discharge from the United States Air Force. Mr. Williams further stated that the allegations were fully known by his superiors prior to his appointment at the United States Air Force Academy.

During the hearing on Mr. Williams' appeal counsel for the appellant moved to strike from the notice of proposed adverse action the charges of attempted homosexual assaults on November 30, 1957, and May 10, 1958, for the reason that these matters had been investigated and resolved prior to Mr. Williams' discharge from military service. During the hearing counsel for the appellant also contended in essence that the failure and refusal of the Department of the Air Force to produce Airman Ryan, Stevens, and Tyler for cross-examination was arbitrary and a way of falsifying an error. Counsel for the [fol. 38] appellant moved to strike from the notice of proposed adverse action the allegation that Mr. Williams on March 4, 1959, willfully damaged a Government typewriter for the reason that no evidence had been produced to show willful damage and that the charge was sheer conjecture.

The presentation by the U. S. Air Force Academy consisted of affidavits and record evidence to substantiate each and every allegation made in the notice of proposed adverse action.

Since the testimony presented by the parties relative to the charges is highly controversial, it is necessary to resolve the conflicts in the evidence. Many factors enter into the weight to be given testimony of witnesses. Among other things it must be recognized that there is a natural human tendency for persons to make statements that are in their own interest. It was certainly in Mr. Williams' interest to deny the allegations made by the U. S. Air Force Academy. Although Mr. Williams ascribes certain motives to Airmen Carwithen and Ryan and Sergeant Tyler for making accusations against him of attempted homosexual assault, it is inconceivable that three different persons on three different occasions at wide intervals of time would make fictitious accusations of homosexual attempts against them by the same person unless such attempts did in fact occur. For this reason the conflicts in evidence as to whether or not Mr. Williams made the homosexual attempts as set out in the notice of proposed adverse action is resolved in favor of the U. S. Air Force Academy. Although Mr. Williams denied that he damaged a Government typewriter as alleged in the notice of proposed adverse action he stated in his reply that he used a paper clip to remove carbon from the keys. The fact that he was using a paper clip on the keys lends credence to the testimony of the witnesses to the incident, and the amount of damage resulting becomes immaterial.

Under standards of the U. S. Civil Service Commission which are uniformly applied to all applicants for employment in the competive Federal service immoral conduct, among other things, is disqualifying. If it promotes the efficiency of the Federal service for the Civil Service Commission to disqualify applicants who have indulged in immoral acts such as homosexual attempts, it logically follows that it promotes the efficiency of the Federal service for employing agencies to remove employees for such conduct even though it occurred prior to the appointment. For this reason the contention of counsel for the appellant that the offenses which occurred on November 30, 1957, and May 10, 1958, should be disregarded is not well taken.

In his reply to the notice of proposed adverse action Mr. Williams in substance alleged that the removal action in his case was based upon discrimination because of race. For this reason the case was referred to the Deputy Employment Policy Officer of the U. S. Air Force Academy for consideration under the procedures established [fol. 39] by the President's Committee on Government Employment Policy. Under date of August 11, 1959, the Deputy Employment Policy Officer for the U. S. Air Force Academy informed Mr. Williams that his claim of discriminatory employment practices had not been substantiated. The evidence submitted by the parties and obtained in the investigation of Mr. Williams' Section 14 Veterans' Preference Act appeal fails to show that the removal action was the result of discrimination because of race.

PART VI, CONCLUSIONS AND RECOMMENDATION

After reviewing and considering all the evidence obtained in the investigation and presented at the hearing, it is concluded:

(1) The Department of the Air Force, U. S. Air Force Academy, complied with the procedural requirements of Section 14 of the Veterans' Preference Act of 1944, as amended, and Part 22 of the Civil Service Commission Regulations in removing Mr. Williams from his position;

(2) After resolving the conflicting evidence in favor of the U. S. Air Force Academy it is concluded that Mr. Williams did attempt homosexual assaults on or about November 30, 1957, May 10, 1958, and February 11, 1959, and was found damaging a Government typewriter on March 4, 1959, as alleged in the notice of proposed adverse action issued by the United States Air Force Academy under date of March 11, 1959;

(3) Under the circumstances the action of the United States Air Force Academy removing Mr. Williams from his position was warranted and did promote the efficiency of the Federal service.

Therefore, no change is recommended in the action of the Department of the Air Force, United States Air Force

Academy, removing Mr. Daniel A. Williams from the position of Recreation Supervisor (Special Activities and Services), GS 7, $4980 per annum.

PART VII, NOTIFICATION OF THE RIGHT OF FURTHER APPEAL TO THE BOARD OF APPEALS AND REVIEW.

No further appeal from this decision will be entertained from either Mr. Williams or the United States Air Force Academy unless it is submitted to the Board of Appeals and Review, U. S. Civil Service Commission, Washington 25, D. C., within seven (7) days after the receipt of this decision. Notification of a further appeal should be given to this office so the case file can be transmitted promptly to the Board of Appeals and Review. Since there is no [fol. 46] right to a further hearing, additional representations, if any, should be made in writing and submitted in duplicate with the appeal to the Board of Appeals and Review.

/s/ Charles W. Hoover
CHARLES W. HOOVER
Appeals Examiner

/s/ A. T. Bailey
A. T. BAILEY
Acting Director

[fol. 41] SUMMARY OF HEARING

SECTION 14 APPEAL OF DANIEL A. WILLIAMS

Date of Hearing: May 5, 1959

Place of Hearing: Regional Office, Tenth U. S. Civil Service Region, Denver Colorado

Persons Present at Hearing:

(a) For the Commission

Charles W. Hoover, Appeals Examiner
....., (Any other persons present at the request of the Commission and not in the interest of either of the parties)

(b) For the Appellant

Daniel A. Williams, Appellant
Irving P. Andrews, Attorney at Law, (Appellant's designated representative,

(c) For the Agency

Josephine L. Dillion, Chief, Placement and Employee Agency's representative
Management Relations Division, (officer, agency witnesses, etc)
Roger P. Fox, Captain, USAF
Provost Marshal
U. S. Air Force Academy

Mr. Hoover, the Appeals Examiner, made a preliminary statement in which he outlined the procedures that would be followed during the hearing, reviewed the reasons set forth in the notice of proposed adverse action for the removal, and administered the oath to the following persons:

Mr. Daniel A. Williams, Appellant
Mrs. Josephine L. Dillion, Chief, Placement and Employee Management Relations Division

[fol. 42] Mr. Andrews, attorney for the appellant, then inquired as to whether the Air Force Academy would have any additional affidavits to offer in evidence. Mrs. Dillion

replied that she had obtained an affidavit from William H. Rutledge, Captain, USAF, which would be submitted together with a copy of the Request for Personnel Action, Standard Form 50, by which Captain Rutledge initiated the appointment of Mr. Williams. Mrs. Dillion stated that this evidence would be offered to substantiate statements in her affidavit that Mr. Williams had been well accepted at the Academy and that the removal was based solely on the charges set out in the notice of proposed adverse action. There being no objections to the receipt of this additional evidence, it was accepted by the Appeals Examiner.

Thereafter, Mr. Andrews moved to strike from the notice of proposed adverse action the allegation that Mr. Williams on March 4, 1959, willfully damaged a Government typewriter for the reason that no evidence had been presented to show willful damage as alleged and for the further reason that the charge was sheer conjecture and not based upon facts. The Appeals Examiner overruled the motion to strike the allegation or charge relating to damage of a Government typewriter and pointed out that since some evidence had been presented relative to the matter the Commission would determine whether there was sufficient evidence to sustain the charge.

Mr. Andrews next moved to strike the allegations or charges of attempted homosexual assaults on November 30, 1957, and May 10, 1958, for the reason that these matters were investigated and resolved prior to Mr. Williams' discharge from the military service and on the ground that they had absolutely nothing to do with the appellant's conduct after he became a civilian employee of the Air Force Academy. Counsel further pointed out that the investigation of the alleged incidents was known by the Air Force Academy prior to Mr. Williams' appointment. The Appeals Examiner overruled Mr. Andrews' motion to strike the charges of attempted homosexual assaults on November 30, 1957, and May 10, 1958.

Mr. Andrews then stated that he desired the record to show that the case under consideration did not involve a situation where there was alleged fraudulent concealment or misrepresentation which induced the employing agency

to hire the appellant and that there had never been any failure on the part of the appellant to disclose material facts in appointment papers. Mr. Andrews continued his presentation on behalf of the appellant by next referring to the charge of alleged attempted homosexual assault on February 11, 1959. Mr. Andrews stated that the affidavits offered on behalf of the appellant and others relating to the alleged incidents on November 30, 1957, and May 10, 1958, were not intended by the appellant to constitute a waiver of any objection that he might have made to the jurisdiction being asserted by the Air Force Academy and the Civil Service Commission in the case and with that in [fol. 43] mind he would like to offer in evidence two affidavits relating to the reputation of Mr. Williams. He pointed out that the first affidavit which he desired to submit executed by Gloria J. Hegedus relating to the alleged incident on November 30, 1957, shows that Carwithen was not introduced to the affiant by Mr. Williams as stated in Carwithen's affidavit. Mr. Andrews pointed out that the affidavit of Gloria Hegedus was being offered to impeach Carwithen's credibility as a witness. There being no objections Gloria Hegedus' affidavit was accepted by the Appeals Examiner for consideration in the case.

Mr. Andrews next interrogated Mrs. Dillion as to whether or not Airman Alton Tyler, Airman Curtis L. Stevens, and Airman Patrick J. Ryan were available for attendance as witnesses at the hearing; and, if so, why they had not been brought to the hearing. In reply Mrs. Dillion stated that Airman Ryan and Tyler were stationed at Colorado Springs but that the Air Force Academy saw no need for their attendance at the hearing and did not consider that they would be able to add anything to the case by appearing at the hearing. Mr. Andrews stated that in other words the request which the appellant made for the appearance of Airman Ryan, Stevens, and Tyler was rejected to which Mrs. Dillion replied in the affirmative.

Mr. Andrews made inquiry of the Appeals Examiner as to whether or not the report of investigation included information concerning the physical outlay of Room 403 in the Colorado Hotel on November 30, 1957. He expressed

his belief that this information would show Mr. Carwithen's statements to be in error in that the room had twin beds rather than a single bed. Counsel also stated that he believed that this information was available in the files of OSI at the Air Force Academy and that the investigator had indicated that the information would appear in the report of investigation. The Appeals Examiner informed Mr. Andrews that the investigator would be contacted for the information on this point.

Mr. Andrews then stated that he had nothing further to present except another affidavit concerning the reputation of Mr. Williams. Mrs. Dillion interjected that the Air Force Academy had never questioned the general reputation of Mr. Williams and expressed her belief that any introduction of evidence concerning Mr. Williams' general reputation was irrelevant. However, she interposed no objection to the Appeals Examiner receiving the affidavit of Mr. Byron C. Bolles, Jr. which Mr. Andrews offered in evidence.

At this point in the hearing Mr. Andrews asked Captain Fox if Airman Ryan had furnished him (Captain Fox) a statement on March 11 1959, to which Captain Fox replied in the affirmative and stated that Airman Ryan had also furnished a statement immediately after the alleged incident occurred on February 11, 1959. Mr. Andrews then asked if the statement Airman Ryan made on February [fol. 44] 11, 1959, was available to which Captain Fox replied in the affirmative.

At this point the Appeals Examiner stated that since a question had been raised concerning the statement of Airman Ryan on February 11, 1959, and a copy of the statement was not included in the report of investigation that it would be obtained and submitted to Mr. Andrews for review.

Mr. Andrews next directed questions to Mrs. Dillion concerning her participation in the conference at which it was decided to initiate the removal action against Mr. Williams. In reply to these questions Mrs. Dillion stated in essence that Captain Fox had the affidavits from the airmen, initially took them to Colonel Westbrook, who in turn called the Civilian Personnel Office and asked for

prompt action on the case. Mrs. Dillion stated that there was a conference in Colonel Westbrook's office attended by Colonel Westbrook, Mr. Dodson, Arthur Peterson, and herself. It was further testified that it was after the conference that Civilian Personnel obtained all the records, rescinded the first letter, and issued a new notice of proposed adverse action.

Mr. Andrews next asked Mrs. Dillion if Mr. Williams' responses were available to her prior to the time she made her affidavit. She replied that Mr. Williams' responses most certainly were considered prior to any decision to take the action and before she made her affidavit. Further questioning Mrs. Dillion Mr. Andrews asked whether the opinion stated in her affidavit was on the basis of information judically considered to which Mrs. Dillion replied that the removal action was taken on the basis of evidence considered to be valid and based upon knowledge of good personnel practices.

Mr. Andrews continued to examine Mrs. Dillion with questions of whether it was her opinion that Mr. Williams' responses did not constitute a refutation of the charges. The witness answered in the affirmative and pointed out that the other affidavits were considered. The other affidavits were then identified as those of Carwithen and the other airmen. Mr. Andrews then asked Mrs. Dillion if she was saying that she considered the statement of Carwithen, which was taken prior to Mr. Williams' discharge from the Air Force, as valid charge for Mr. Williams' removal even though the Carwithen statement had been found insufficient for action while he was in the military service. In reply to this question Mrs. Dillion stated that the information in the Carwithen statement was not known to the appointing officer of the Air Force Academy, who is the Civilian Personnel Officer, at the time Mr. Williams was appointed; and, if it had been known, Mr. Williams would not have been selected for appointment. Mrs. Dillion also referred to Colonel Bourne's affidavit in which he gave his reason for not furnishing the information in the Carwithen affidavit to the appointing authority. It was pointed out that Colonel Bourne had also stated in his affidavit that had he been aware of any

[fol. 45] other incidents involving homosexual activities such would have caused him to take a different approach with respect to his endorsement of Airman Williams to the Office of Civilian Personnel. Mr. Andrews then stated that in other words evidence rejected for a formal court martial while Mr. Williams was in the military service was used to remove him from his position.

Mrs. Dillion proceeded by testifying in substance that the information in the Carwithen affidavit was never made known to the Commander; that if Civilian Personnel had known of the Office of Special Investigation reports, they would have made a determination of Mr. Williams' suitability prior to his appointment; that if Civilian Personnel had known of the Carwithen statement, Mr. Williams would not have been hired; that the affidavits of the airmen were accepted because of the parties making the statements, the nature of their positions, and the manner in which the statements were made.

At this time Mr. Andrews again made a point of the fact that Airman Ryan and Tyler are assigned to duty at the Air Force Academy and even though their presence had been requested at the hearing for cross-examination, the Air Force had failed to produce them as witnesses. Counsel for the apellant contended that the refusal to produce these airmen as witnesses was arbitrary and the best method to falsify on error.

At this point in the hearing the Appeals Examiner pointed out that there were inferences in the presentation on behalf of Mr. Williams that the removal action stemmed from discrimination based upon race or color. The Appeals Examiner explained that the President's Committee on Government Employment Policy has jurisdiction in complaints alleging discriminatory practices based upon race, color, religion, or national origin. Mr. Williams and his counsel were then asked if they desired to pursue any allegations of discrimination made by having the matter referred to the Deputy Fair Employment Policy Officer of the Air Force Academy. Mr. Williams replied in the affirmative.

In summarizing the case for the Department of the Air Force, Mrs. Dillion stated in substance that it is the con-

stant responsibility of management to examine the conduct of the employees of the agency both on and off the job and determine suitability for continued employment; that a complete examination of available information had been made in the decision to remove Mr. Williams from his position; that considering the position which Mr. Williams held, the influence over the moral and social behavior of the Academy personnel, removal was the only action that could be taken under the circumstances.

At the conclusion of Mrs. Dillion's remarks on behalf of the Department of the Air Force, counsel for the appellant initiated his summation of the case by again [fol. 46] pointing out that there had been no opportunity to cross-examine the witnesses on whose statements the removal action had been taken and under the circumstances the motives of these witnesses were unknown. Counsel continued with a question of what was the real motive of Airman Ryan in coming to Mr. Williams' home on the date in question. Did he (Ryan) come at the express direction of some other person and failing to achieve his purpose, supply the evidence he sought? Mr. Andrews in essence further related that the evidence on which the removal action was based was not conclusive or even substantive; and that, although the Air Force Academy may not have acted beyond the scope of the law in taking the action, there had been a breakdown in the administrative application of the law and regulations when the only reason for a removal was utilization of affidavits containing only allegations. Mr. Andrews stated that it had been revealed that as far as the agency determination to remove Mr. Williams, there apparently was no second formal conference after the new evidence was discovered but that the second notice of proposed adverse action was issued after Mr. Williams had already been kicked off of the installation. Counsel for the appellant also related that it was unreasonable to assume that Mr. Williams could have worked for the Academy while in the military service and then later in the same capacity as a civilian without someone revealing to Civilian Personnel the information upon which the removal action was based particularly in view of the fact that Mr. Williams' presence

was so prominent at the Academy that Mrs. DeSmet, his immediate supervisor, did not want him to occupy the same office with her.

At the conclusion of Mr. Andrews' summation, Mrs. Dillion stated that the Air Force Academy did not know that the discrimination issue would be introduced and thought there was no evidence of discrimination. She further reviewed the reasons of the Air Force Academy for issuing a new notice of proposed adverse action after all of the information was brought to the attention of the Civilian Personnel Office. Mrs. Dillion also pointed out that Mr. Williams was informed of his right to appeal under the Air Force grievance procedure as well as to the Civil Service Commission.

Mr. Andrews replied that the appellant was aware of his right to proceed under Air Force grievance procedure but had elected to appeal to the Civil Service Commission in order to exhaust his administrative remedies should it become necessary to go into the court.

There being no further presentation by either party the Appeals Examiner closed the hearing.

[fol. 47] "EXHIBIT I" TO COMPLAINT

Post Office Box #1291
Denver 1, Colorado
August 17, 1959

Board of Appeals and Review
U. S. Civil Service Commission
Washington 25, D. C.

Gentlemen:

I appeal the decisions of adverse action taken by the United States Air Force Academy and the Director, Tenth United States Civil Service Region. The complete file of the case is being forwarded by the Tenth Civil Service Region.

In addition to the file case being forwarded by the Civil Service Regional office, I offer the following comments and whatever additional documents that may be pertinent to the case:

THE CHARGES AND EVIDENCE:

I was first charged for one offense of misconduct in a letter dated 6 March 1959. This letter was later withdrawn and another letter issued on 11 March 1959 listing three charges and allegations of misconduct. The evidence in these instances consisted of three affidavits. The fourth charge stated that I willfully damaged a Government typewriter. To these charges I wrote a six page reply dated 11 March 1959. I denied these charges and allegations then and I repeat the denial now.

I take exceptions to some statements made by the Tenth U. S. Civil Service Regional Appeals Examiner, Mr. Charles W. Hoover, as follows:

I did not state that my removal was based on racial discrimination, the record clearly states what reasons were finally used to remove me from the position of Recreation Supervisor. I stated in my reply "I have not been welcome on my job, racially, workmanship, ability, or any other way." I did not say that these were the reasons finally

used to remove me. I appealed under Section 14, Veterans Preference Act of 1944, as amended the action finally taken. I filed my complaint of racial discrimination under separate charges with the proper authorities. I would also like to take exception to the fact that the Appeals Examiner states "The presentation by the U. S. Air Force Academy consisted of affidavits and record evidence to substantiate each and every allegation made in the notice of proposed adverse action." The Air Force Academy did not produce record evidence of any nature. There were only affidavits presented at the hearing.

[fol. 48] I charge that the Air Force Academy deliberately held back the Office of Special Investigations record, if it had them, because these records would show that I was not involved in the activities of Airman Robert H. Carwithen and his girl friend McCABE, now undesireably discharged from the United States Air Force. The Air Force Academy's refusal to allow my accusers that it (The Academy) had jurisdiction over to be cross examined was a way to let lies stand as evidence. This latter action is a direct violation of the Sixth Article of the United States Constitution.

I have not been permitted to face my accusers at any time during this paper trial of my character. There have been serious charges and action taken against me. Life was the only thing left after the action. My liberty was taken away and my freedom was removed. There couldn't possibly be pursuit of happiness under these circumstances.

THE CHARGES AND ANALYSIS OF EVIDENCE:

I do not have copies of the affidavits made by my accusers in order to quote verbatim. Airman First Class Robert H. Carwithen stated that I shared a double bed with him in Room 403, Colorado Hotel, 406 17th Street, Denver, Colorado, on or about 30 November 1957. The hotel records clearly shows that the room in question had twin beds. Carwithen further states that I arranged a meeting between he and WAF Gloria J. Hegedus. Miss Hegedus' affidavit of 4 May 1959 enclosed in the file of the case being forwarded clearly disproves this statement of Carwithen.

I will again state this affidavit submitted by Carwithen is a diabolical lie clothed in the sheath of vengeance.

Staff Sergeant Alton Tyler stated that I approached him for immoral purposes and that he did not report me because I was due out of the Air Force in six (6) months. I am enclosing copies of correspondence between Congressman Clyde Doyle of California and myself dated as late as 23 September 1958 which will prove that I had not made up my mind to definitely leave active duty until this letter arrived. I am more than certain that Tyler had no knowledge of my intentions concerning active military duty as early as May 1958 when I did not know them myself. Tyler disclaims telling me of his family troubles and that he did not show me his bruised shins alluding that I could not see them on the road due to darkness. I stated earlier that I was parked at Jenny's Inn at Blackhawk, Colorado when Tyler broke down and told me these things. (This is enclosed in the file) I owned a new 1957 Ford Fairlane 500 coupe and the flick of a button lighted the entire interior of my car. This enabled me to see Tyler's shins completely. I would have requested the presence of Captain Norman J. Hansen to testify as to whether Tyler's wife asked him to intercede to bring them together again; however, no opportunity was ever presented for witnesses to appear, at least this has not been the case to date.

Airman Second Class Patrick J. Ryan was beyond a doubt acting on direct orders or induced to come to my home in order to make the new charge and character assination for the express purpose of removing me from the position as Recreation Supervisor. A court of Law and Justice would bring this evidence to light. The illusion [fol. 49] that I would damage a Government typewriter in the presence of other people, even if I had had reasons to do, does little credit to the intelligence to those believing it. I had a master key to the building in which this typewriter was housed and could use it at any time to enter for whatever reasons I desired. The date was March 4, 1959 instead of February 4, 1959 as stated on page three part V of the Tenth Civil Service Region's report.

The Tenth Civil Service Regional Appeals Examiner and Director alleges, on page four of their report "Among other things it must be recognized that there is a natural human tendency for persons to make statements that are in their own interest. It was certainly in Mr. Williams' interest to deny the allegations made by the U. S. Air Force Academy. Although Mr. Williams ascribes certain motives to Airmen Carwithen and Ryan and Sergeant Tyler for making accusations against him of attempted homosexual assault, it is inconceivable that three different persons on three different occasions at wide intervals of time would make fictitious accusations of homosexual attempts against them by the same person unless such attempts did in fact occur." These men are obviously disregarding any and all circumstances surrounding this whole affair. Carwithen made his statement approximately eight (8) months after the alleged incident occurred and Tyler waited 19 months after the alleged incident. These men took an oath under the terms of their contract with the Air Force to guard the security of the organization and the nation. Their failure to report a legitimate breach of security such as homosexuals are classified would not lend credence to their statements when they are given only for the purpose of character assination. If I had known that Sergeant Tyler was rumor spreading in September 1958 as stated by Airman Third Class Harris in his affidavit, I would have brought him before the proper authorities prior to my discharge from the Air Force just as I called Mr. Gallamore, Chief, OSI 14th District, Lowry Air Force Base, Colorado, concerning the McCabe case. This observation and conclusion drawn by the Appeals Examiner and the Director are just as valid as the various Communistic countries accusations against the late John Foster Dulles of his being a war monger plotting an attack against the Soviet Union. I am sure that all of the Communist Leaders would gladly sign an affidavit to lend credence to their statements. Airman Second Class Ryan was in fact sent to my home by Captain Roger Fox, Provost Marshal, Air Force Academy, who had access to the OSI report being held by the Air Force Academy Inspector General, Major Mathias and

later Col McCullough. Ryan made trips between my home and Captain Fox's home on the night of 11 February 1959 while establishing an occasion to file his character assination charges. This fact is on file in the Provost Marshal's office and has been seen by Lt Col Walter E. Echelberger, and also the Civil Service Commission Investigator. There were two undercover agents assigned to trail me, Ryan was one and there was another who would trail me home nightly. I lived under this Gestapo type working conditions from early January until firing tactics were changed to character assination and charges finally filed. The purpose of a defense is to bring creditable facts to light, but to say that my interests were of such magnitude to warrant my telling a lie and that judgment in favor of [fol. 50] the Air Force Academy was based on this, is incredible. Th Appeals Examiner, under Section 14, Veterans Preference Act of 1944, as amended, holds life or death power over the average veteran who appeal a case. Many of these veterans do not have another vocational field to fall back on and many have families. The cold facts of life and human nature would warrant a better display of wisdom than shown in this case by the examiner and the Director.

I would like the record to show that I served honorably with the United States Navy from 20 February 1943 to 6 June 1946, and from 4 October 1950 to 31 May 1953. I remained in Ready Reserves during this entire period of inactive duty. I received three honorable discharges from the United States Navy. I served on active duty with the United States Air Force from 11 October 1954 to 10 October 1958. I have served honorably and well with the Federal Services since 1943. I am proud of my record and will forever fight to clear my name.

I appealed this case because I am seeking justice through administrative processes. This is being done on advice of my attorney, the United States Attorney General, and my Congressman. All of the foregoing people advised court action as a last resort.

I take exception to the statement of page five under analysis of evidence "For this reason the contention of

counsel for the appellant that the offenses which occurred on November 30, 1957, and May 10, 1958, should be disregarded is not well taken." Counsel for the appellant stated that alleged offenses should be disregarded, for no such offenses occurred.

The Democratic procedure as guaranteed by the United States Constitution has been completely disregarded in this case. The Air Force Academy made sure that I never had the opportunity to face my accusers and that they would not have to face cross examination. This in essence ruled out adequate defense. The Appeals Examiner and the Director, Tenth Civil Service Region, made it clear that three affidavits, by three different people, executed at three different times, made me guilty in their sights. I would indeed hate to think that this is the pillar of American Justice. I stand ready to risk my life today just as I did against this type of justice in 1943.

I ask you gentlemen of the Board of Appeals and Review to weigh the circumstances surrounding this whole affair and to clear my name restoring the sixteen years of proud honorable service with the United States Government to which I am unconditionally entitled.

Yours very sincerely,

/s/ Daniel A. Williams
DANIEL A. WILLIAMS.

3 Encls:

[fol. 51] "EXHIBIT J" TO COMPLAINT

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

March 14, 1960

Mr. Daniel A. Williams
Post Office Box 1291
Denver 1, Colorado

Dear Mr. Williams:

This refers to your further appeal from the decision of the Tenth U. S. Civil Service Region, sustaining, under Section 14 of the Veterans' Preference Act, as amended, the action of the Department of the Air Force in removing you, effective April 12, 1959, from the position of Recreation Supervisor (Social Activities and Services), GS-188-7, $4980 per annum, 7625th Support Group, Air Force Academy, Colorado Springs, Colorado, on charges involving three instances of attempted homosexual assaults and for willfully damaging Government property.

The Board of Appeals and Review has fully reviewed and considered the entire appellate record in the case, including all representations submitted by you, your attorney, and the agency.

The Tenth Civil Service Region found that the agency complied with all the procedural requirements of the law and the Commission's regulations in effecting your removal; that under the circumstances the conflicting evidence relative to the attempted homosexual assaults which allegedly occurred on or about November 30, 1957, May 10, 1958, and February 11, 1959, and in connection with the alleged damaging of a Government typewriter on March 4, 1959 should be resolved in favor of the U. S. Air Force Academy; and that your removal based on the sustained charges was considered to be for such cause as would promote the efficiency of service within the meaning of Section 14 of the Veterans' Preference Act.

Your appeal is based on a denial of the charges, on an attempt to discredit the evidence used by the agency to substantiate the charges, and on allegations of errors in

the Tenth Region's decision. In this connection you take exception to the statement in the Regional Office decision that you charged the removal action was based on racial discrimination. You say that you did not actually allege [fol. 52] this was the reason finally used to remove you. However, the record shows that you did file a complaint with the Deputy Fair Employment Policy Officer of the Air Force Academy, and that this complaint was based upon alleged racially discriminatory practices toward you by your supervisors. In view of this fact it is considered that this exception to the Tenth Region's decision is not well taken.

You also take exception to the fact that the Tenth Region's decision stated: The presentation by the U. S. Air Force consisted of affidavits and record evidence to substantiate each and every allegation made in the notice of the proposed adverse action." You claim that the Air Force Academy did not produce record evidence of any nature. However, the file contains statements of Airmen upon whom you allegedly attempted homosexual assaults provided by the Office of Special Investigations, affidavits, and official personnel records. Accordingly, it is considered that this exception is also not well taken.

It is not quite clear what you mean by the charge that the Air Force Academy deliberately held back records of the Office of Special Investigations "because these records would show that I was not involved in the activities of Airman Robert E. Carwithen and his girl friend McCabe, now undesirably discharged by the U. S. Air Force." Certainly the file shows that statements from the Airmen upon whom you allegedly attempted homosexual assaults were provided by the Office of Special Investigations.

Your charge, that the decision of the Air Force Academy not to require attendance at the hearing by the Airmen upon whom you had allegedly attempted the homosexual assaults was a direct violation of your constitutional rights under the Sixth Amendment to the United States Constitution because this did not allow you, or your representative, to confront these adverse witnesses and to cross-examine them, is without merit. Protection of the

Sixth Amendments extends to criminal charges but does not apply to the administrative action of removal.

You contest the credibility of the testimony of Airman First Class Robert H. Carwithen because the hotel records allegedly show that the room that you shared was provided with two single beds instead of a double bed as he said in his statement and because the affidavit of WAF Gloria J. Hegedus denies that part of the statement by Carwithen in which he said that you introduced her to him. You also attempt to show that the testimony of Staff Sergeant Tyler was unreliable because his statement as to the reason he gave for not immediately reporting the alleged homosexual assault was shown by subsequent correspondence not to have been true and because Tyler's statement that you could not have seen unhealed scars on his leg in the darkness ignored the fact that the light-[fol. 53] ing system in your automobile enable you to see clearly by the flick of a button. You also infer that the testimony of Airman Second Class Patrick J. Ryan was perjury which could have been established through cross-examination and was the result of a deliberate attempt at entrapment by the Office of Special Investigations. These charges and allegations directly contradict at least part of the evidence given against you by the adverse witnesses. However, after a thorough consideration of the entire record the Board has determined that the conclusion of the Tenth Civil Service Region, "that it is inconceivable that three different persons on three different occasions at wide intervals of time would make fictitious accusations of homosexual attempts against them by the same person unless such attempt did in fact occur", is sound.

It is the opinion of the Board that the charge that you damaged a Government typewriter is not supported by sufficient evidence, and this charge is not sustained.

As a result of its consideration, the Board has determined that the U. S. Air Force Academy complied with the procedural requirements of Section 14 of the Veterans' Preference Act of 1944, as amended, and the Commission's regulations pursuant thereto, Part 22, in effecting your removal; that the charge that you attempted to commit

homosexual assaults upon three different individuals is substantiated by a preponderance of the evidence; and that your removal based on the sustained charges, was warranted and effected for such cause as would promote the efficiency of the service within the meaning of Section 14 of the Veterans' Preference Act. Accordingly, the decision of the Tenth U. S. Civil Service Region, copies which were furnished to you and to your attorney under cover of letter dated August 21, 1959, is affirmed.

For the Commissioners:

Sincerely yours,

JOHN E. BLANN, Chairman
Board of Appeals and Review

[fol. 54] IN THE
UNITED STATES DISTRICT COURT

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE "FIRST AMENDED COMPLAINT"—Filed February 10, 1961

Come now the defendants by their attorney, the United States Attorney for the District of Columbia, and move this Honorable Court for summary judgment on the "first amended complaint" for the reason that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

Incorporated herein by reference and made a part hereof are the exhibits of defendants attached to defendants' original motion for summary judgment which was filed on September 19, 1960, prior to the filing of the "first amended complaint." Said exhibits are identified as defendants' Exhibit No. 1, Affidavit of Harry O. Carr, together with the enclosures attached thereto and defendants' Exhibit No. 2, the Affidavit of Mary V. Wenzel, together with the enclosures attached thereto.

/s/ Oliver Gasch
OLIVER GASCH
United States Attorney

/s/ Edward P. Troxell
EDWARD P. TROXELL, Principal
Assistant United States Attorney

/s/ John F. Doyle
JOHN F. DOYLE
Assistant United States Attorney

/s/ C. Thomas McCally
C. THOMAS MCCALLY
Assistant United States Attorney

[fol. 55] IN THE
UNITED STATES DISTRICT COURT

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE, PURSUANT TO RULE 9(1) OF THIS COURT
Filed February 10, 1961

In this cause defendants move for summary judgment. Defendants contend that there is no genuine issue of material fact present in this cause of action. Pursuant to Rule 9(1) of the Rules of this Court the following material facts as to which defendants contend there is no genuine issue are stated as follows:

1. That, prior to April 12, 1959, plaintiff was employed as a Recreation Supervisor (Grade GS-7) at the United States Air Force Academy, Colorado.

2. That, on March 11, 1959, plaintiff was charged by the Air Force Academy in writing, with having been guilty of certain acts of misconduct and notified that his removal was proposed.

3. That, by letters dated March 11, 1959, and March 16, 1959, plaintiff replied to the charges and set forth his side of the case.

4. That, by letter dated April 10, 1959, plaintiff was informed that he would be discharged from his aforesaid position of employment, effective April 12, 1959.

5. That plaintiff appealed this discharge decision under the Veterans' Preference Act of 1944, as amended (5 U.S.C. 863) to the Tenth United States Civil Service Region, Denver, Colorado, which body on August 14, 1959, affirmed plaintiff's dismissal.

[fol. 56] 6. That plaintiff appealed the said decision of the Tenth United States Civil Service Region to the Board of Appeals and Review, United States Civil Service Commission, Washington, D. C., which body on March

14, 1960, affirmed the decision of the Tenth United States Civil Service Region.

/s/ Oliver Gasch
OLIVER GASCH
United States Attorney

/s/ Edward P. Troxell
EDWARD P. TROXELL, Principal
Assistant United States Attorney

/s/ John F. Doyle
JOHN F. DOYLE
Assistant United States Attorney

/s/ C. Thomas McCally
C. THOMAS MCCALLY
Assistant United States Attorney

[fol. 57] IN THE
UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—
Filed February 23, 1961

Comes now plaintiff and by his undersigned attorneys moves this Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

As grounds therefore plaintiff states that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law.

As further grounds for this motion, plaintiff respectfully refers this Honorable Court to the first amended complaint and exhibits annexed thereto, plaintiff's separate statement of material facts filed pursuant to the provisions of Rule 9(1) of the Rules of this Court and plaintiff's memorandum of points and authorities in support of plaintiff's motion and in opposition to defendants' motion for summary judgment heretofore filed herein.

Dated: February 23, 1961

DICKSTEIN & SHAPIRO

By /s/ Sidney Dickstein
SIDNEY DICKSTEIN
1411 K Street, N. W.
Washington, D. C.

Attorneys for Plaintiff

[fol. 58] IN THE
UNITED STATES DISTRICT COURT

PLAINTIFF'S STATEMENT OF MATERIAL FACTS PURSUANT TO RULE 9(1) OF THE UNITED STATES DISTRICT COURT—
Filed February 23, 1961

Pursuant to Rule 9(1) of the U. S. District Court Rules plaintiff makes the following statement of facts as to which there is no genuine issue.

1. Plaintiff, a veteran's preference eligible, served in the United States Air Force from October 11, 1954 to October 10, 1958 and received an Honorable Discharge.

2. Prior to *April 12, 1959*, plaintiff was employed as a Recreation Supervisor (Grade GS-7) at the United States Air Force Academy, Colorado.

3. Prior to his removal, plaintiff was a permanent Civil Service employee credited with sixteen (16) years of service.

4. On March 6, 1959 the Department of the Air Force [fol. 59] instituted a removal proceeding against plaintiff because of an alleged "attempted homosexual assault" upon an unnamed airman of the Air Police Squadron located at the Air Force Academy.

5. On March 6, 1959 the Department of the Air Force, for the same reason that prompted the aforesaid removal proceeding, issued an Expulsion Order which prohibited and prevented plaintiff from entering the Air Force Academy and placed him in a non-duty status. The Expulsion Order was for an indefinite period and has been in full force since March 10, 1959.

6. On March 11, 1959 the Department of the Air Force rescinded the removal proceeding instituted on March 6, 1959, and simultaneously instituted a second removal proceeding against the plaintiff. Notwithstanding the rescission of the removal proceeding instituted on March 6, 1959, plaintiff continued to be subject to the aforesaid Expulsion Order.

7. The second notice of removal, dated March 11, 1959, was based upon alleged "attempted homosexual assaults"

upon three airmen not less than two of whom were under the military command and control of the Department of the Air Force at all times pertinent hereto. Two of the "assaults" were alleged to have occurred in 1957 and 1958 while the plaintiff was an airman in the United States Air Force.

8. By letters dated March 11, 1959, and March 16, 1959, plaintiff replied to the charges and set forth his side of the case. On April 10, 1959, plaintiff was informed that he would be discharged from his aforesaid position of employment, effective April 12, 1959.

[fol. 60] 9. On April 12, 1959 the Department of the Air Force discharged and removed plaintiff from his civil service position. At the time of said removal and discharge plaintiff had been involuntarily placed in a non-active duty status for a period of more than thirty days.

10. Plaintiff appealed this discharge decision under the Veterans' Preference Act of 1944, as amended (5 U. S. C. 863) to the Tenth United States Civil Service Region, Denver, Colorado, which body on August 14, 1959, affirmed plaintiff's dismissal.

11. In the course of the aforesaid appeal, plaintiff repeatedly attempted to call three airmen as adverse witnesses, two of whom had accused plaintiff of "attempted homosexual assault[s]" upon them. The three airmen were under the military control and command of the Department of the Air Force and were stationed and on duty at the Air Force Academy in the State of Colorado.

12. The Department of the Air Force deemed it unnecessary for these airmen to attend the hearing and be cross-examined as adverse witnesses claiming: (a) that any testimony they could give would be repetitious; (b) that plaintiff would have been unable to discredit them on cross-examination even had officials of the Air Force Academy deemed it necessary for them to attend; and (c) that their testimony would have been more damaging to plaintiff than their sworn accusations (which constituted the sole basis for a finding that plaintiff "attempted homosexual assault[s]".)

13. Plaintiff's removal by the Department of the Air [fol. 61] Force was based on the accusatory statements secured from three airmen and the Civil Service Commission's affirmance of the Department's action was likewise based upon the aforesaid statements. Plaintiff has never been afforded the opportunity to confront and cross-examine said airmen.

14. The decision of the Appeals Examiner of the Tenth U. S. Civil Service Region concluded that plaintiff had engaged in improper conduct warranting his removal by the Department of the Air Force because:

> ". . . it is inconceivable that three different persons on three different occasions at wide intervals of time would make fictitious accusations of homosexual attempts against them by the same person unless such attempts did in fact occur. For this reason the conflicts in evidence as to whether or not [plaintiff] made the homosexual attempts as set out in the notice of proposed adverse action is resolved in favor of the U. S. Air Force Academy."

15. Plaintiff appealed the said decision of the Tenth United States Civil Service Region to the Board of Appeals and Review, United States Civil Service Commission, Washington, D. C. On March 14, 1960 that Board affirmed the decision of the Tenth United States Civil Service Region stating:

> "After a thorough consideration of the entire record the Board has determined that the conclusion of the Tenth Civil Service Region 'that it is inconceivable that three different persons on three different occasions at wide intervals of time would make fictitious accusations of homosexual attempts against them by the same person unless such attempt did in fact occur' is sound.
>
> [fol. 62] It is the opinion of the Board that the charge that you damaged a Government typewriter is not supported by sufficient evidence, and this charge is not sustained.

As a result of its consideration, the Board has determined that the U. S. Air Force Academy complied with the procedural requirements of Section 14 of the Veteran's Preference Act of 1944, as amended, and the Commission's regulations pursuant thereto, part 22, in effecting your removal; that the charge that you attempted to commit homosexual assaults upon three different individuals is substantiated by a preponderance of the evidence; and that your removal based on these sustained charges, was warranted and effected for such cause as would promote the efficiency of the service within the meaning of Section 14 of the Veterans' Preference Act. Accordingly, the decision of the Tenth U. S. Civil Service Region, copies which were furnished to you and to your attorney under cover of letter dated August 21, 1959, is affirmed."

Dated: February 23, 1961

DICKSTEIN & SHAPIRO

By /s/ Sidney Dickstein
SIDNEY DICKSTEIN
1411 K Street, N. W.
Washington 5, D. C.

Attorneys for Plaintiff

[fol. 63] IN THE
UNITED STATES DISTRICT COURT

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT—Filed March 14, 1961

This matter comes before the Court for hearing and oral argument on the Defendants' motions for summary judgment on the complaint and on the first amended complaint, and Plaintiff's cross-motion for summary judgment. After consideration of the pleadings, the record, the memoranda of points and authorities in support of and in opposition to the motions, the affidavits and exhibits on file in the case as well as the other papers on file therein, and the Court finding as a matter of law that there are no material issues of fact in existence in the case, it is this 14th day of March, 1961,

ORDERED, that the Defendants' motions for summary judgment be, and the same hereby are, granted; and

FURTHER ORDERED, that the Plaintiff's cross-motion for summary judgment be, and the same hereby is, denied.

/s/ Leonard P. Walsh
LEONARD P. WALSH, Judge

Attorneys:

Sidney Dickstein, Esq., 1411 K Street, Washington 5, D. C.
for the Plaintiff

Hon. Oliver Gasch, United States Attorney,
For the Defendants

[fol. 64] IN THE
UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed March 30, 1961

Notice is hereby given this 29th day of March 1961, that

Plaintiff

hereby appeals to the United States Court of Appeals for the District of Columbia from the order of this Court entered on the 14th day of March, 1961 granting summary judgment to the Defendants against said Plaintiff and denying Plaintiff's motion for summary judgment.

/s/ Sidney Dickstein
Attorney for
Plaintiff

1411 K Street, Washington 5, D. C.

[fols. 66-103]

[fol. 104] Date 11 February 1959

STATEMENT.

I, Airman Second Class Patrick J. Ryan, AF16583466, 7625th Air Police Squadron, United States Air Force [fol. 105] Academy, Colorado, having had Article 31 of the Uniform Code of Military Justice read and explained to me by Captain Roger P. Fox, and having been advised that the offense(s) being investigated is (are) homosexual activities at the United States Air Force Academy, Colorado, do hereby, without coercion, duress, or unlawful influence or inducement, make the following voluntary statement:

At approximately 2110 hours, 10 February 1959, I telephoned Danny Williams, assistant service club director, USAF Academy, at the service club, USAF Academy, for the purpose of discussing or obtaining possible leads for the sale of Presto Pride Cookware products which I am selling during my off-duty time. This call was made from Cosmos Restaurant, 126 East Colorado Avenue, Colorado Springs, Colorado. A/1C Joseph Proetti, 7625th USAF Dispensary and A/2C John W. Eatmon and A/3C Franklin D. Parker, both of the 7625th Air Police Squadron were present at the time this call was made but were not aware of to whom the call was placed or the subject discussed. Williams stated that he would be willing to discuss this matter at his home, 106 Spruce Street, Colorado Springs, Colorado, as soon as he returned from the USAF Academy; that he expected A/2C Curtis Stephens, Headquarters Squadron, USAF, to provide him with transportation to his home in a short time. Williams gave me his phone number, MElrose 2-9724, and to call until he answered, indicating that he had arrived home. This completed the telephone conversation between Williams and myself at this time.

I left Cosmos Restaurant by myself at approximately 2130 hours and drove to J's Drive-In Restaurant, 119 East Cache La Poudre Avenue, where I wrote a letter to my fiancee and had a cup of coffee.

I left J's Drive-In Restaurant at approximately 2200 hours and drove to Williams' residence, arriving at approximately 2205 hours. I could see no lights burning in Williams' house and there was no response to my knock on the door. I assumed Williams had not yet returned home.

I returned to my car, drove two blocks north from Williams' residence, made a U turn and parked at this [fol. 106] point on the west side of Spruce Street to await Williams' return.

At approximately 2320 hours, I observed, what I believe to be a 1955 two-door, hardtop, Buick, bearing 1958 Michigan license plates, with the prefix DC and carrying three people, proceeding south on Spruce Street. This car passed me, made a U turn approximately two blocks south of my position and parked on the east side of Spruce Street directly in front of Williams' residence. I saw three persons dismount from this vehicle and proceed in the direction of Williams' house.

At this time, approximately 2324 hours, I made a U turn and proceeded to the residence of Captain Roger P. Fox, apartment 39, 624 North Cascade Avenue arriving at approximately 2330 hours. I advised Captain Fox of the events set forth in the preceding part of this statement. I telephoned Williams from Captain Fox's apartment at approximately 2335 hours. Williams answered this call and said to come over to his house. I told Williams I would be over in ten or fifteen minutes.

I departed Captain Fox's apartment at approximately 2350 hours and arrived at Williams' residence at approximately 2355 hours.

Upon entering the house through the front door which opens immediately into the living room, I noticed the following:

a. lighting in this room was extremely dim since the only source of illumination was two small table lamps, one of which was fitted with a blue bulb and the other with a green bulb.

b. a hide-a-bed sofa standing against the north wall was open to the bed position. Blankets and sheets on

this bed were in a rumpled condition and the bed was not properly made up.

c. two persons were seated in the living room. They were A/2C Curtis Stephens, Headquarters Squadron USAFA, who was seated in a chair on the south side of the room and Airman Jay Harris who is assigned to [fol. 107] the USAF Academy. Airman Harris was seated on the foot of the bed.

d. Williams was in the kitchen which adjoints the living room.

e. a radio was in operation and within several minutes of my arrival, I heard the sign-off of station KYSN, Colorado Springs.

I removed my car coat which was taken by Williams and placed in the clothes closet. I then sat down in a chair in the northeast corner of the room and was handed a bourbon and water highball by Williams. Williams seated himself immediately on my left on a chair which he had brought from the kitchen. Shortly thereafter, Williams placed three records on a record player. Two of these records I recognized as recordings of Lena Horne.

Williams' conversation during this time was directed exclusively toward me and concerned his plans for selling auto insurance and also business relations with certain discount houses within this area. He (Williams) proposed that my product (Presto Pride Cookware) be advertised in conjunction with his insurance and discount house activities. This was to be accomplished through printed advertisements distributed through the mails. Williams suggested that I listen to the mood music on the hi-fi and meditate on this proposal.

At this point, Williams, Stephens and Harris began a discussion of Williams' career as an airman assigned to the USAF Academy then located at Lowry Air Force Base. This discussion dealt primary with the excellent relationship which, Williams asserted, existed between himself, Colonel Cook, DCS/P USAFA, his squadron commander (Captain Hansen's predecessor), and Captain Renz, special services officer, Headquarters USAFA. Williams stated that these officers were responsible for his employment in his present position.

There was some general discussion on the subject of education, some more drinks were served and then Stephens and Harris departed at approximately 0100 hours. [fol. 108] 11 February 1959. Throughout this period of conversation, Williams would from time to time put his hand on my shoulder and leg.

After Stephens and Harris had departed, Williams moved from his chair next to me and lay down on the bed. He then complained that the light was too bright and hurt his eyes, got up from the bed, turned off the lamp in the south side of the room, and wrapped a cloth around the remaining lamp also placing a book on top of the shade of this latter lamp. He (Williams) then lay down on the bed.

Williams then observed that my chair must be uncomfortable and suggested that I lounge on the bed next to him. I complied with his suggestion and we listened to the mood music which was still playing.

Williams repeatedly asked me if I were serious about our business arrangement and commented that we (Williams and I) could make a terrific go of it together.

At this point Williams got up, mixed another drink apiece, and returned to bed. In handing it to me, he spilled part of the drink on my shirt which I then removed together with my T shirt. Williams hung these garments by the heater to dry. Williams then returned to bed.

After a few minutes, Williams grasped me by the back of the neck and stated he would give me a massage. He (Williams) rubbed the back of my neck, my shoulders, my arms, my chest and my legs.

At this point, Williams opened the fly of my trousers and took my penis in his hand. At the same time, he opened his own trousers and exposed his penis. He asked me to take his penis in my hand as he did mine. After forcibly detaching myself from Williams, I told Williams that this was too much too soon, got up from the bed, adjusted my clothing, replaced my T shirt and shirt, took my coat and departed with the statement no hard feelings, I'll see you tomorrow night or words to that effect.

I departed Williams' residence at approximately 0225 hours and drove immediately to Captain Fox's apartment

[fol. 109] arriving at about 0230 hours. I immediately proceeded to make the foregoing statement to Captain Fox.

PATRICK J. RYAN
Airman Second Class, USAF
AF16583465

Subscribed and sworn to before me this 11th day of February 1959 at USAF Academy, Colo.

ROGER P. FOX
Captain, USAF
Summary Court Martial
7625th Support Group

Date: 9 March 1959

STATEMENT

I, Airman Second Class Charles C. Templeton, AF 14606944, Headquarters Squadron Section, 7625th Support Group, USAF Academy, Colorado, having had Article 31 of the Uniform Code of Military Justice read and explained to me by A/1C Charles E. McDaniels, and having been advised that the offense being investigated is damage to government property, do hereby, without coercion, duress, or unlawful influence or inducement, make the following voluntary statement:

Wednesday night, March 4, 1959, at approximately 1830 hours, I went to the Service Club. I spoke to all personnel in the Club at the time. Williams came up to me and asked me to come to his office for he (Williams) had something to show me. We (Williams and I) proceeded to Williams' office where he showed me a letter addressed to Williams and signed by Lt. Cook. This letter stated that Danny Williams would receive an unsatisfactory report of performance if he didn't change his ways.

At approximately 1835 hours, 4 Mar 59, A/2C Patrick J. Ryan arrived. A few minutes later (approximately 3), Airman Garbart came in the office and asked to use the [fol. 110] telephone. I then departed from the office and returned within 7 or 8 minutes. Airman Garbart hung up the telephone just as I arrived. I then gave Williams back his letter.

Williams took a piece of paper and asked me if I would be a character witness if his case went to court. I stated I would and Danny Williams wrote my name down. Ryan stated that he (Williams) should get some "brass" on this list. He then wrote down Captain Rutledge's name, and Ryan inquired why. Williams then turned to his desk, grabbed a piece of paper and gave it to Ryan. This was a letter of recommendation to Williams and signed Lt. Rutledge. I also saw General McElroy's name on this paper.

Airman Ryan stated that there was a note left on a Sergeant's desk. This note according to Airman Ryan stated the following:

1. Contact Denver Police concerning typewriter samples.
2. Go to Cadet Dispensary, Lt. S[illegible]enson's office and Captain Renz's office for typewriter samples.
3. General Briggs gave his consent to Captain Fox to "Lower the boom".

Airman Ryan stated that General Briggs probably meant that Captain Fox could start an investigation.

I then asked Williams what was the deal on a letter. Williams said that there had been a letter written, but he did not say who or where it came from. I stated that any fool who wrote a letter should have enough sense to change the typewriter keys if they didn't want it traced. Williams gave me an odd look and asked me how? I then told him that I have seen girls use a finger nail file and scrape the keys of a typewriter. I stated that I have also straightened keys by bending them to the left or right. Williams then turned around in his chair, opened his desk drawer and took out a paper clip. He (Williams) then turned towards his typewriter. Williams was doing something

to the keys of the typewriter, to the best of my knowledge. Danny's hands and arms were moving back and forth and his hands were inside the key cover.

[fol. 111] Williams then turned towards his desk, and to the best of my knowledge, picked up something from the desk and once again turned to the typewriter and went through some motions with his hands which were once again inside the key cover of his typewriter.

Danny once again turned towards his desk and picked up a piece of white paper, then put the paper in the typewriter, and closed the cover. Danny then started typing. He (Danny) then picked up another piece of paper from his desk, took the paper and held it close to the piece of paper which was already in his typewriter. I got up from my chair and stood next to Danny. I saw that Danny was comparing the two pieces of paper on which the words R. O. T. C. Wonder Boy were typed. Danny and I, both at the same time, noticed that the letter "O" was too close to the "T". Williams then opened the key cover and picked up a paper from his desk. He then pushed the letter "O", grabbed the key with his right hand and bent the key to the left. Williams then closed the cover, pushed another key and bent this one also. I do not know what letter this was. Williams then typed ROTC WONDER Boy again and made a satisfied murmur.

I then asked Williams if he hadn't heard the rumor about a certain civilian woman and an officer who was having family trouble? I stated that this rumor had been in circulation for approximately three months. Williams seemed very puzzled and replied "No, who?". I said Jeanne and Captain Rutledge.

Williams then asked us (Ryan and I) if we wouldn't join the glee club and sing. We then departed his office.

Subscribed and sworn to before me this 9th day of March 1959 at United States Air Force Academy, Colorado.

Date: 9 March 1959

STATEMENT

I, Staff Sergeant Alton (NMI) Tyler, AF18408104, Headquarters Squadron Section, USAFA, United States [fol. 112] Air Force Academy, Colorado, having had Article 31 of the Uniform Code of Military Justice read and explained to me by A/1C Charles E. McDaniels, and having been advised that the offense being investigated is homosexuality, do hereby, without coercion, duress, or unlawful influence or inducement, make the following voluntary statement:

In May of 1958, I was residing in barracks #962, Lowry AFB, Denver, Colorado. A/1C Danny Williams whom I had known for approximately eight (8) months prior to May 1958, was supposed to have got a date for myself, A/3C Robert J. Harris and A/1C Jordon (now discharged). Saturday night, which the date was set for, A/3C Harris and A/1C Jordon stated that they did not wish to go on the date. A/1C Williams and myself went to the YWCA in Denver. We were there approximately thirty (30) minutes and Danny stated that all the girls had gone to Central City, Colorado. I questioned Danny in regards to whether or not he could really get me a date and he assured me that he could. We then proceeded to a bar in Central City called the "Keyhole". A/1C Williams sat down at a table and I started talking to two (2) women who were standing at the bar. The two (2) women and I departed, for Black Hawk, Colorado, leaving Danny at the "Keyhole". We (myself and the two (2) women went into a bar, the name I do not remember. We went into a backroom because there were no one in the front. As I entered the backroom I saw approximately fifteen (15) girls, most of them were paired off in two's (2). I attempted to dance with some of the girls, but they wouldn't have anything to do with me. I stood around for a few minutes watching the females and I noticed that they were kissing each other and feeling of each others breasts. After seeing this I started for the door and met A/1C Williams. Williams sat down at a table with some girls and started talking. I continued to stand around

waiting for Williams to give me transportation back to Lowry.

[fol. 113] At approximately 0100 hours, Williams departed for Lowry. Somewhere along the road Williams stopped the car and we dismounted and urinated. When we (Williams and I) got back into the car, Williams asked me if he could rub my back. Danny stated that I looked very tired. I asked Williams what he meant and he stated "nothing I just want to rub your back". I asked Danny that, if he was "that kind" he had better leave me alone because I would not have anything to do with him. He then started the car and we proceeded towards Denver. All the way to Lowry Danny was taking hold of my arm and trying to force me across the seat close to him. Danny kept placing his hand on my arm and once on my leg. I told Danny that if he didn't quit I was going to knock him out the door. Danny then told me that he didn't want to make me mad and he (Williams) begged me not to tell anyone about his actions. The following day I informed T Sgt William Moore of the aforementioned incident and he told me to do whatever I wanted to. I decided not to tell Captain Hansen of the incident because Williams was getting discharged in the near future and the Air Force would be rid of him.

ALTON TYLER

Subscribed and sworn to before me this 9th day of March 1959 at United States Air Force Academy, Colorado.

Witness:

CHARLES E. McDANIELS
A/1C, USAF.
Air Police Investigator

Date 9 March 1959

STATEMENT

I, Airman Second Class Ronald C. Davis, AF 55552468, Headquarters Squadron Section, USAFA, United States Air Force Academy, Colorado, having had article 31 of [fol. 114] the Uniform Code of Military Justice read and explained to me by A 1C Charles E. McDaniels, and having been advised that the offense being investigated is homosexuality, do hereby, without coercion, duress, or unlawful influence or inducement, make the following voluntary statement:

On or about the 20th of June 1957, I went to the Centennial Race Track in Denver with Airman Danny Williams. We (Danny and I) left the race track at approximately 2030 hours and proceeded to a package store and Williams purchased a six (6) pack of Country Club Malt liquor.

Danny and I proceeded to a gravel country road. I could see that we were located somewhere on a mountain or a hill overlooking Denver. After drinking several of the malt liquor, I suggested to Danny that we stop and urinate. We stopped and I walked over into a ditch and threw a couple of the empty cans away, finished urinating, then returned to the car and got in.

Williams looked at me and asked me if I was tired. I told Danny that I was not tired but relaxed. Williams then stated to me "You look tired, let me rub your back". Danny told me that the Japanese were good at giving rub downs and that he had learned how to do it from them. I told Danny two or three times that I didn't want a rub down, I wanted to go to town and look the city over. Danny then started the car and we drove for approximately fifteen (15) minutes, then Danny stopped the car on the right hand side of the road. Danny turned towards me and reached out and took hold of my hand and held it tenderly between his right and left hands.

I don't remember the exact words that Danny used but he told me that I was very emotional and asked me if I was lonely. I became very worried as I realized that Danny's actions were that of a homosexual. I jerked my

hand from between his hands and told Danny to take me back to the barracks. Danny hesitated to start the car and remarked to me "I won't tell anyone what you've told [fol. 115] me". He (Williams) also stated "We won't say anything about tonight". We then returned to Lowry AFB and I went to bed.

RONALD C. DAVIS

Subscribed and sworn to before me this 10th day of March 1959 at United States Air Force Academy, Colorado.

Witness: PATRICK J. RYAN.

CHARLES E. McDANIELS
A/1C, USAF
Air Police Investigator

Date 12 March 1959

STATEMENT

I, Airman Second Class Ralph E. Purcell, AF17482557, Headquarters Squadron Section, 7625th Support Group, United States Air Force Academy, Colorado, having had Article 31 of the Uniform Code of Military Justice read and explained to me by A/1C Charles E. McDaniels, and having been advised that the offense(s) being investigated (are) homosexuality, criminal libel, slander, malicious destruction of government property, do hereby, without coercion, duress, or unlawful influence or inducement, make the following voluntary statement:

On 31 December 1958, at approximately 2130 hrs, A/2C Templeton and myself departed from the Academy and proceeded to the residence of Mr. Danny Williams on Spruce Street in Colorado Springs. We (Templeton and I) arrived at approximately 2200 hrs. Upon entering the house, we were greeted by Williams, and other people

(men) who I now do not remember. The people who were already there were sitting around talking and drinking (Country Club Malt liquor and mixed drinks). The lighting was very dim in the living room and the overhead light in the kitchen was on.

For the next few hours, we sat around talking and drinking (I myself do not drink alcoholic beverages so I [fol. 116] was drinking cokes). At approximately 2330 hrs. two men came into the house, a schoolteacher and a TV announcer. They had a few drinks and departed at approximately 0030, 1 Jan 59.

At approximately 0330 hrs, 1 Jan 59, a telephone call was made to Mrs. Jeanne DeSmet. I do not know who made this phone call. A few minutes later, approximately 0400 hrs, Templeton and the other men with the exception of Williams and I, departed for DeSmet's residence.

At this time, I moved to the couch due to the fact that I was very tired. It was a few minutes later that Williams sat down on the floor next to the couch where I was lying and started to carry on a conversation. I told Williams that I was very tired and wanted to sleep and that if he wanted the couch I would sleep on the floor. He insisted that I sleep on the couch. At this time, the conversation carried to different fields namely, my girl and myself, our future plans, sports, massaging, and the muscles and construction of a persons body. I am very well versed on this subject due to the fact I was a masseur for a year and a half at McClellan AFB, California (This was my duty assignment). During this conversation of muscles, massaging and body structures, I noticed that Williams began to feel the structure of my arms and legs. At first, I thought this was more or less normal due to the conversation, but it didn't stop after the first touch. He (Williams) seemed to be experiencing an inward feeling that seemed to bother him, and he just kept on trying to touch my legs and arms. I then realized that this was more than a touch of the muscles and I removed his hand from my leg. As the conversation (massaging, and/or body structure) continued, he (Williams) again began to touch my arms and legs, and I again repeated my actions of removing his hands from me. Once again, Williams

tried to touch my legs and arms and, as I pushed him away, this time Williams pulled me to the floor. As Williams forcibly held me to the floor, he (Williams) used one of his hands to caress my body. I then forcibly [fol. 117] detached myself from Williams. At this time, I told Williams to get away, or words to this effect. I then returned to the couch and Williams went to the bed he made for himself on the floor. Williams then made an excuse for his actions but I cannot remember the exact words.

At this time, I could not sleep for fear that Williams would return. The previous took place at approximately 0445 hrs and I did not go to sleep until approximately 0530 hrs.

At approximately 0600 hrs, Templeton and the other fellows returned. We (Williams and I) got up, cooked breakfast and ate.

At approximately 0800 hrs after finishing eating, Williams unfolded the couch (made a bed out of it) and Templeton and I went to sleep on the bed. I slept under both sheets, and to the best of my knowledge, Templeton slept between the sheet and blanket.

At approximately 0930 hrs, we awoke and the remainder of the day was spent watching the football games. We departed (Templeton and I) Williams' house at approximately 1730 hrs and returned to the base.

I have no knowledge of any letters that were written, namely the letters that were shown to me during my interrogation. However, the statement has been made that if two or three people would confess, then the entire investigation would be over with or words to that effect. A/2C Templeton made this remark.

I have never heard any slanderous remarks against Jeanne DeSmet.

Prior to this investigation, I have no knowledge of any destruction to government property, namely the typewriter that was in Mr. Williams' office.

I have heard numerous rumors about the investigation, but they were only to the affect as to what the nature of the investigation was about.

RALPH E. PURCELL

[fol. 118] Subscribed and sworn to before me this 18th day of March 1959 at United States Air Force Academy, Colorado.

Witness: PATRICK J. RYAN

CHARLES E. McDANIELS
A/1C, USAF
Air Police Investigator

18 September 1959

DOSPC (Mrs. Dillion)

Daniel A. Williams Appeal of Decision of Tenth U.S. Civil Service Region Sustaining the Removal Action of the U.S. Air Force Academy

Board of Appeals and Review
United States Civil Service Commission
ATTN: Mr. John E. Blann, Chairman
Washington 25, D.C.

Dear Sir

1. Reference is made to your letters dated 25 August and 14 September 1959, BAR: ELK, in which this office was afforded an opportunity to reply to the representations made in the Section 14 Appeal of Mr. Daniel A. Williams in the case of his removal from the position of Recreation Leader, GS-7, at the United States Air Force Academy.

2. We have reviewed Mr. Williams' letter of appeal dated 17 August 1959 carefully and we believe that his representations are in essence as follows:

a. That the charges upon which the United States Air Force Academy based its decision to remove Mr. Williams are not substantiated by the evidence;

b. That if Mr. Williams had been given the opportunity to cross-examine key witnesses who furnished affidavit testimony he could have discredited their veracity;

c. That the procedures followed in effecting his removal including his right of appeal and in the hearing before a

[fol. 119] representative of the Civil Service Commission under Section 14 of the Veterans Preference Act of 1944, as amended, are not in accordance with the due process provided by the Constitution.

3. With reference to the first contention of Mr. Williams, the U.S. Air Force Academy takes the position that the evidence in the case clearly sustains the charges set forth in the notice of proposed adverse action. Although Mr. Williams states that the Air Force Academy did not produce record evidence, the file will clearly show that there was presented in support of the case affidavits, copies of reports from the Office of Special Investigations' files and official personnel records, copies of all records pertinent to the case as well as affidavit testimony of all witnesses who had first hand knowledge of the matters involved in his removal. From the statements made in Mr. Williams' letter it does not appear that he clearly understands the meaning of the term "record evidence." All the evidence that was introduced in behalf of the U.S. Air Force Academy was offered for the purpose and does substantiate the charges made against Mr. Williams.

4. With reference to the inability of Mr. Williams to cross-examine key witnesses; we wish to emphasize that there was no design or intent on the part of any official of the Air Force Academy to preclude Mr. Williams from such an opportunity. These witnesses had furnished sworn statements concerning Mr. Williams' behavior on certain occasions and it was considered unnecessary to bring them to the hearing as it was felt that any testimony they could give would be repetitious. Knowing the character and reputation of the airmen who were concerned in this matter, it is firmly believed that even had the officials of the Air Force Academy deemed it necessary for them to attend, neither the counsel for Mr. Williams nor Mr. Williams could have discredited them upon cross-examination. In fact, there is a possibility that they could have made even more damaging statements about Mr. Williams' conduct and behavior.

[fol. 120] 5. Finally, as indicated above, Mr. Williams contends that the entire procedure followed in his case is not in accordance with the due process of the Constitution. Our only reply to this contention is that we have to the best of our ability followed the spirit and the letter of the law in effecting Mr. Williams' separation, and that his separation was necessary to promote the efficiency of the Federal Service.

Sincerely,

JAMES E. DODSON,
Appointing Officer.

Copy to: 10th U.S.C.S.C.
DCSPC (Mr. Baker)
Affidavits

[fols. 121-124]

[fol. 125] AFFIDAVIT

STATE OF COLORADO,
County of El Paseo,
City of Colorado Springs.

I, Robert J. Harris, Airman Third Class, United States Air Force Academy, being duly sworn, make this statement of my own free will, without any promises or assurances:

Reference appeal of Daniel A. Williams under Section 14, Veterans Preference Act of 1944, I have no personal knowledge concerning the specific charges brought in letter dated March 11, 1959 from the Director of Civilian Personnel addressed to Mr. Williams other than the statement which I have already made dated March 7, 1959 to Captain Roger P. Fox, Provost Marshal, United States Air Force Academy, and I do hereby incorporate that statement in this affidavit by reference.

I have read the above statement consisting of 1 page, which is true and complete to the best of my knowledge and belief. I further understand that the information

I have given is not to be considered confidential and that it may be discussed with or shown to the interested parties.

ROBERT J. HARRIS,
A/3C, USAF Academy.

Subscribed and sworn to before me at Colorado Springs, Colorado, this 24th day of April, 1959.

ROBERT M. SEFRANKA,
U. S. Civil Service Commission.

7 March 1959.

STATEMENT

I, A/3C Robert J. Harris, AF16509624, Hq Sq Sec. USAF Academy, Colorado, having had Article 31 of the Uniform Code of Military Justice read and explained to me by A/1C Charles E. McDaniels, and having been ad- [fol. 126] vised that the offense(s) being investigated is (are) Criminal Libel, Homosexuals Malicious & Willful Destruction of Gov Property, do hereby, without coercion, duress, or unlawful influence or inducement, make the following voluntar statement:

About the week of 23 Feb 59, Mr. Williams asked me if I wanted to go to a party on the 28 of Feb 59 at his home and he stated only to ask Ann Ruth & Ann Touzien. Airman Bowman was going to the same party and offered to give us a ride down to Mr. Williams place. We left the barracks about 2100 hours and on our way stopped at the Kademy Drug to buy some Liquor. We arrived at Mr. Williams place about 2130 hours, and the party was in full swing. When I arrived I went to the kitchen which is behind the living room and started to drink. I noticed several people I knew, a couple of airmen from the Band, Airman Davis, Airman Linguist, Ann Saganski, Airman Percell, also a few Cadets were there the only names I remember are Al Johnson and Joe Santas. The party

broke up about 0100 hours and Airman Bowman drove me back to the barracks.

On 6 March 1959, I stopped in at the service club and was watching T.V. Airman Stevens asked me if I'd like to ride up with him to Danny Williams house and I said OK. We departed the Service Club at about 2200 hours. on the way Airman Stevens said that Danny wanted me to come up with him if I was around. We arrived at Danny's about 2300 hours and he was in bed. I mentioned I was suppose to see the Provost Marshal tomorrow. Airman Stevens and Danny started to talk as if they knew what it was all about and then he had a letter he wanted me to read and I read it. Then he asked me if I'd type up some type of statement telling how long I've known him and what type of individual I thought he was and I agreed to do it but this morning I changed my mind.

In this letter accusing him of Homosexuality it stated a member of the Air Police Squadron. It also stated that this act was taken place on the 11 of February 1959. Airman Stevens and myself took Danny home that night. [fol. 127] The night of 6 March 1959 Mr. Williams mentioned that the only one he could think of was Airman Ryan being from the Air Police Squadron and at his place on the 11 of February 1959. He said that he was suspicious of Airman Ryan and didn't want to be alone with him. He said that he didn't want Airman Stevens and myself to leave that night. He also mentioned that Airman Ryan complained of a stiff neck and sore ankles. while airman Stevens and myself were there Airman Ryan didn't mention this, and he said Airman Ryan removed his shirt and he gave him a rub down on the neck, shoulders and back. He said he was going to rub some salve on his ankles and Airman Stevens made the remark that from there you could of seduced him. (Ryan)

Mr. Williams further mentioned because of his Female way's and being nice to people would get him in trouble. Mr. Williams also mentioned that certain people tryed to involve him in some letters that were typed on his typewriter but stated they couldn't make it stick because various airmen have used the typewriter. Airman Stevens

said Royce was mad at him because he was helping Danny get home from the Service Club while Danny's car was in the garage. Stevens also mention that Royce told someone that Jeanne DeSmet was the one that pressed the issue on the letters.

Mr. Williams speaking to Airman Stevens said that they shouldn't of registered under different names at a hotel they stayed in, in Denver. Mr. Williams registered under Al Williams and I don't remember what Airman Stevens said he registered under. Mr. Williams went further to explain why he used Al Williams, because it was his middle name and he used it quite often when he was in Show business. Airman Stevens stated the reason for him using a different name was that he didn't want people calling him up and bothering him.

Mr. Williams said that tomorrow morning 7 Mar 59, he was going to go to Denver and see about getting a job at the Tropics. He stated that the Publicity he would get from this would help him in show business. Mr. Williams [fol. 128] and Airman Stevens mentioned that the Rocky Mountain News would like to print anything that will make the Academy look bad. Airman Stevens then said that some time back there was an article in the Rocky Mountain News on the Academy to do with spending of money for furniture and he said General Briggs called the library and said he wanted every copy of the Rocky Mountain News they had. Airman Stevens told Danny Williams first thing in the morning to go to Denver and see a lawyer and get a Federal Indictment on the notice banning him from this Military Installation. Mr. Williams said he would. Airman Stevens said to fight this at all cost and if he needed any money he'd call home and get some money.

In regards to the 11 of Feb 59 Mr. Williams said that why should he want to Love Airman Ryan "by not me (Harris) because he said I was better looking than him. (Ryan). Mr. Williams mentioned He knew a living doll of a man he slept with but never touched him.

Mr. Williams made the remark that Mrs. DeSmet was submitting to Capt Ruthledge to get ahead.

On or about June or July 1958 I was laying in my bed and Sgt. Tyler came in and said he went out with Mr.

Williams and he stated Williams made a pass at him. Sgt Tyler said they were driving in the Mountains, I believe from Central City, and Danny pulls off the side of the road. Sgt Tyler asked why he stopped and he said he was a little tired and then he made a pass. Sgt Tyler said he grabbed his leg but he didn't tell me how far he got.

About the first of the year, I, was sitting in the Service Club and a group were talking about dancing, one party said why don't you dance, and someone said well there's no women here, and Airman Stevens said Men dance with Women whats wrong with Men dancing with Men.

The night of 10 Feb 59, Mr. Williams and Airman Stevens asked me if I'd like to ride along while Stevens took Danny home and I did. We left the Service Club at about 2230 hours and arrived Williams place about 2300 hours. We had a few drinks and the phone rang, Williams answered it, which was about 2330 hours and said that this [fol. 129] airman wanted to come over to get some help with something to do with selling something. This party arrived at about 2400 hours and Danny introduced him to me as Airman Ryan. I was sitting at the end of the bed, Airman Stevens was sitting about in front of me and Airman Ryan and Mr. Williams were sitting by the heater and phonograph. The room was dimly lit. A few drinks were served and most of the conversation was on Airman Ryan and about his sales business. Airman Stevens and I left about 0030 hrs, Airman Ryan was still with Williams.

ROBERT J. HARRIS.

Subscribed and sworn to before me this 8 day of March 1959 at USAF Academy, Colo.

ROGER P. FOX.

AFFIDAVIT

STATE OF COLORADO,
County of El Paso,
City of Colorado Springs.

I, Patrick J. Ryan, Airman Second Class, being duly sworn, make this statement of my own free will, without any promises or assurances:

Reference appeal of Daniel A. Williams under Section 14, Veterans Preference Act of 1944, and specific charges contained in letter dated March 11, 1959, from the Director of Civilian Personnel, United States Air Force Academy, to Daniel A. Williams, I have no personal knowledge of incidences described and dated November 30, 1957 or May 10, 1958.

On March 11, 1959, I furnished a statement to Roger P. Fox, Captain, USAF, Provost Marshal, United States Air Force Academy, concerning my knowledge of the incident which occurred on February 11, 1959. I hereby incorporate that statement in this affidavit by reference.

Reference letter dated March 11, 1959 addressed to Mr. James E. Dodson, Director of Civilian Personnel, page 4, [fol. 130] paragraph 3, wherein Daniel Williams refers to my pleading with him to remain; he was the one that asked me to stay after the others had left. Paragraph 4 refers to a statement that I complained of leg and feet pains and asked if I could stretch out on the bed next to him. Williams observed that my chair must be uncomfortable and suggested that I lounge on the bed next to him. His explanation and version of me removing my T-shirt and shirt is erroneous and misleading. The reason for the removal of the shirt and T-shirt was due to the fact that Williams spilled a drink on me.

I deny the allegations made in paragraph 3 under summary, page 5. Any information disclosed by me was under the direct order of Captain Roger P. Fox, Provost Marshal, United States Air Force Academy, and not for purposes of regaining my position.

My knowledge of the charge of willful damage of government property is contained in my statement of March 5, 1959 given to Roger P. Fox, Captain, USAF. I herewith incorporate said statement in this affidavit by reference. Further, contrary to Williams statement on page 5, paragraph 3, A/2C John Dorsey, Special Services, was not in the room at the time the typewriter was believed to be damaged.

I have read the above statement consisting of 2 pages, which is true and complete to the best of my knowledge and belief. I further understand that the information I have given is not to be considered confidential and that it may be discussed with or shown to the interested parties.

PATRICK J. RYAN,
A/2C, USAF.

Subscribed and sworn to before me at Colorado Springs, Colorado, this 21st day of April, 1959.

ROBERT M. SEFRANKA,
Investigator,
U. S. Civil Service Commission.

[fol. 131]

STATEMENT

11 March 1959

I, Airman Second Class Patrick J. Ryan, AF16583466, 7625th Air Police Squadron, USAF Academy, Colorado, do hereby voluntarily and of my own free will make the following statement without having been subjected to any coercion, unlawful influence, unlawful inducement, and without any promise of reward, benefit, or any immunity having been made to me:

At approximately 0210 hours, 11 February 1959, at 607 North Spruce Street, Colorado Springs, Colorado, Daniel Alton Williams made a homosexual assault upon my per-

son to wit: Williams opened the fly of my trousers and fondled my genital organs. Williams simultaneously requested that I fondle his (Williams') genital organs.

PATRICK J. RYAN.

Subscribed and sworn to before me this 11th day of March 1959 at United States Air Force Academy, Colorado.

ROGER P. FOX,
Captain USAF,
Summary Court,
7625th Support Group.

EXHIBIT D

AFFIDAVIT

STATE OF COLORADO,
County of El Paso, ss:

I, Captain William H. Rutledge, Jr., Personnel Services Officer, United States Air Force Academy, being duly sworn, make this statement of my own free will, without any promises or assurances:

I requested the establishment of the position of Recreation Supervisor, GS-7 which was authorized for recruitment on 15 September 1958. The Civilian Personnel Office [fol. 132] referred several well qualified applicants for consideration for this position, two of which I interviewed personally. Since Mr. Williams had performed under my supervision from April, 1957 to April, 1958, while we were located in Denver, I was well aware of his ability and had personally recommended him for the recognition he received as Airman of the Month in February, 1958 for overall performance of duty in his position of Recreation Specialist, and I issued him a letter of favorable communications during the month of March, 1958.

In view of my policy for delegating responsibility to subordinates, I discussed Mr. Williams' qualifications with Mrs. DeSmet, who was the Director of the Service Club and under whose immediate supervision Williams would be assigned. She agreed with me at that time that Williams was well qualified for the position and as a result he was selected and appointed on 13 October 1958 following his discharge from the military service.

I was aware of the operating problems which existed as a result of differences in approach to the functioning of the Service Club, and I had counselled both Mr. Williams and Mrs. DeSmet on the need for resolving these differences with a view toward improving Williams' performance. Williams' performance has no bearing on his removal, which was taken by separate authority under the direction of the Commander of the 7625th Support Group on the basis of information disclosed to him by the Provost Marshal.

At the time of Mr. Williams' notice of removal I was on annual leave and had no knowledge of the action until after it was in process. My period of leave began on 25 February and ended on 13 March 1959. I had no knowledge of the incidents for which Williams was removed which occurred prior to his civil service appointment.

I have read the above statement consisting of 1 page, which is true and complete to the best of my knowledge and belief. I further understand that the information [fol. 133] I have given is not to be considered confidential and that it may be discussed with or shown to the interested parties.

WILLIAM H. RUTLEDGE,
Captain, USAF,
Personnel Services Officer.

Subscribed and sworn to before me at ——, Colorado, this —— day of ——, 1959.

ROBERT CHIMBLE,
Major, USAF.

Affidavit

State of Colorado,
County of El Paso,
City of Colorado Springs.

I, Josephine L. Dillion, Chief, Placement Employee Management Relations Division, Civilian Personnel Office, United States Air Force Academy, being duly sworn, make this statement, of my own free will, without any promises or assurances:

I am the authorized representative of the United States Air Force Academy in the appeal of Daniel A. Williams under Section 14 of the Veterans Preference Act of 1944. I do hereby submit the attached statement made by Robert H. Carwithen of Tinker Air Force Base, Oklahoma, dated 1 July 1958, as evidence to support the charges of misconduct as contained in letter of proposed adverse action to Daniel A. Williams dated 11 March 1959.
I have read the above statement consisting of 1 page, which is true and complete to the best of my knowledge and belief. I further understand that the information I have given is not to be considered confidential and that it may be discussed with or shown to the interested parties.

Josephine L. Dillion, Chief,
Placement Employee Management
Relations Division.

[fol. 134] Subscribed and sworn to before me at Colorado Springs, Colorado, this the 24th day of April, 1959.

Robert M. Sefranka,
Investigator,
U. S. Civil Service Commission.

Copy

STATEMENT

Tinker AFB, Oklahoma.
1 July 1958.

I ROBERT HUGHIE CARWITHEN, hereby state that before I was interrogated by or requested to furnish a statement to RALPH G. THOMPSON, who identified himself to me as a Special Agent of the Office of Special Investigations, United States Air Force, this Special Agent read Article 31 of the Uniform Code of Military Justice to me and informed me that the nature of the offense he is investigating is as follows: allegation that CARWITHEN had been the victim of an attempted homosexual act, not consumated, allegedly committed by DANIEL WILLIAMS and advised me that I did not have to make any statement regarding this offense; and that any statements made by me may be used as evidence against me in a trial by court-martial.

I hereby further state that, after the aforementioned explanation, I do hereby voluntarily and of my own free will make the following statement without having been subject to any coercion, unlawful influence or unlawful inducement and without any promise of reward, benefit, or any immunity having been made to me:

I am ROBERT HUGHIE CARWITHEN. I was born 8 July 1935 at Charleston, West Virginia. I enlisted in the USAF in November 1953 at Beckley, West Virginia. I am personally acquainted with Daniel "Danny" Williams, who is an Airman stationed at Lowry AFB, in Denver, Colorado. I first met Williams on a pay day while at the snack bar at the Service Club at Lowry where Williams worked as [fol. 135] a bus boy. Williams approached me, saying he knew a girl who had seen me and wanted me to go to a party with her. I had never met Williams before this time, but had seen him working in the snack bar. Williams then invited me to go on a party with the girl he had mentioned, I think named "Gloria", and to go along with Williams and his date. I agreed to go. I met Williams at the snack bar about 2200 hours, we picked up the two girls both of whom were WAFs' one colored, one white, and proceeded to a place known to me as the "Four Mile House." Here

we drank and danced until about midnight. We left the Four Mile House and took the WAFs back to the Base, let them out at their barracks, took an Airman who we had picked up at the Four Mile House who was a friend of Williams to give a ride back to the base to his barracks, and then Williams suggested that we go get something to eat. I agreed. We drove off base, stopped at a "bottle club" in Denver, then proceeded to restaurant where we ordered something to eat. By this time it was getting very late, and Williams suggested that we not go back to the base, but get a hotel room, sleep, and return to the base Sunday afternoon. I do not remember the month that this happened in, but I think it was November or December of 1957. I agreed to this proposal and we drove to downtown Denver where we got a hotel room. The room only had one double bed in it. I undressed, went to bed, and was about to turn out the light when Williams, who had undressed also, asked, while both were in bed, "can I French you?" or words to that effect. I said no, that I had been brought up differently and that I wouldn't have such a thing going on. I said that I thought he was drunk and didn't know what he was saying. Williams replied that although he had been drinking, he wasn't drunk. I then told Williams that if he didn't leave me alone that I would get up and walk back to the base if I had to. Williams told me not to get excited, that he wouldn't bother me, to go to sleep, that everything would be all [fol. 136] right. At this point, Williams attempted to fondle my privates. I knocked his hands away, saying that if he didn't quit he would get hurt, or words to that effect. At that point, Williams quit trying, and gave me the impression that he went to sleep. I did not go to sleep, but waited for Williams to awaken, which he did about three hours later. In the meantime, I started to leave two or three times, but did not do so because I was not sure where the hotel was located in Denver. Williams arose, dressed, without saying anything to me. On the way out of the room Williams said something to the effect "I love you and I need you." We got into Williams' car and drove straight to the base.

At the base we drove to a mess hall where we ate with two other airmen who were friends of Williams, whose

names I do not know. Afterwards, Williams brought me back to the barracks.

Since that time, I have gone out with Williams a couple of times, only in the presence of other people. Williams came over to my room quite frequently, uninvited by me, usually bringing a drink, coffee etc. In every case except one time, there was always someone else in the room with me when he came over. On that occasion, I awoke to find Williams sitting in a chair in my room looking at me. I asked Williams what he was doing there, and he said that he had come to say good bye and good luck and told me that he was glad he had met me. He said he was sorry that I couldn't see things his way, and that there were things he had wanted to do that I wouldn't. I said "Dan, will you leave the room, I'm sleepy." I repeated this several times until he finally left.

Williams has made no further homosexual advances toward me. This was the last occasion that I had any conversations or dealings with Williams except to see him working in the snack bar.

In regard to Williams' attempt to fondle me in the hotel, I remember discussing it with both Barbara McCabe and [fol. 137] another WAF named "Mamie" Cok(p)ley, (phonetic), an A/2C, colored, but not further identifiable by me. "Mamie" and McCabe had been talking about double dating, "Mamie" had mentioned her going with Williams, and I advised her that she should take my advice and ignore Williams as I thought Williams was a homosexual.

On or about 26 May 1958, while I was in the Tinker hospital, TAFB, Oklahoma, I received a long distance telephone call from Williams who was in Denver. He warned me that some girls at Lowry were in trouble, and blamed me. I asked if it was a girl I had been dating, but Williams wouldn't mention names. William said he had been contacted on the matter of the girls being in trouble, and was asked if he knew me, to which he had told them that he did know me and that I had played as a musician in a show he had staged. Wfliams told me not to talk to anyone if they came to see me or answer any questions until I heard from him. Williams said that he would either talk to me or write to me later. I received a post card

from Williams in June 1958, saying he was on vacation in Canada and that he would write later.

I deny participation in any homosexual acts and deny any knowledge of anyone who has done so. I further state that I have furnished in this statement all the information known to me in regard to this investigation and have nothing further to add to this statement. I have asked Mr. Thompson to type this statement for me, which he has done in my presence.

I further state that I have read this entire statement, initialed all pages and corrections and signed this statement, and that it is correct and true as written.

s/t Robert Hughie Carwithen
ROBERT H. CARWITHEN,
A/1C AF13487988 506th A&E
Maint. Sq., TAFB, Okla.

(fol. 138) Subscribed and sworn to before me this 1 day of July 1958 at 2706 TAFB, Okla., a person authorized by law to administer oaths.

s/t R. G. Thompson,
Signature of person administering oath.

RALPH G. THOMPSON,
Typed name of person administering oath.
Special Agent, 11th Dist. OSI (IG) USAF.

Witnesses:

s/t William F. Morris,
WILLIAM F. MORRIS, S/A,
11th Dist. OSI (IG) USAF.

Certified True Copy. Roger P. Fox, Captain, USAF 43835A.

(fols. 139-146)

[fol. 147]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16345

DANIEL ALTON WILLIAMS, APPELLANT

v.

EUGENE M. ZUCKERT, Secretary of the Department of the Air Force, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

OPINION—November 9, 1961

Mr. Sidney Dickstein, with whom *Mr. David I. Shapiro* was on the brief, for appellant.

Mr. Frank Q. Nebeker, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney, *Charles T. Duncan*, Principal Assistant United States Attorney, and *Charles T. McCally*, Assistant United States Attorney, were on the brief, for appellees. *Messrs. Nathan J. Paulson* and *Daniel M. McTague*, Assistant United States Attorneys, also entered appearances for appellees.

[fol. 148] Before WASHINGTON, DANAHER and BURGER, *Circuit Judges*.

PER CURIAM: The District Court granted summary judgment sustaining the discharge of appellant as a civilian employee of the United States Air Force. Appellant claims that under the pertinent provisions of the Veterans' Preference Act, 58 Stat. 390 (1944), as amended, 5 U.S.C. § 863 (Supp. 1950), and the regulations issued by the Civil Service Commission pursuant to that Act he was entitled to have the appellees produce for cross-examination the three members of the Air Force whose affidavits were the basis of the charges against him. Appel-

lees declined to order the production of these persons as witnesses. There is no claim that the notice of charges or administrative hearing procedures were otherwise defective.

The statutes under which Congress has authorized the dismissal of civilian employees of the government by administrative process do not require the government, in this case the Air Force, to produce for cross-examination the persons whose affidavits or statements supply the factual basis for dismissal. 62 Stat. 354, (1948), 5 U.S.C. § 652(a) (Supp. 1950). The burden of producing witnesses at a Civil Service Commission hearing under the Veterans' Preference Act is, under the pertinent regulation, 5 C.F.R. § 22.607 (rev. 1961), properly left upon the party who wants them. *See Dering* v. *Campbell*, 90 U.S.App.D.C. 171, 194 F.2d 876, *cert. denied*, 344 U.S. 826 (1952). The failure of the Air Force to produce such witnesses here can in no way be viewed as a denial of appellant's statutory and procedural rights. *See Shields* v. *Sharp*, No. 15666 (D.C. Cir. order, Nov. 1, 1960); *Ellis* v. *Mueller*, 108 U.S.App.D.C. 174, 280 F.2d 722, *cert. denied*, 364 U.S. 883 (1960).

Appellant concedes he did not request the three Airmen [fol. 149] to attend the hearing; he concedes he does not know whether, if asked, they would have attended or, if they attended how they would testify. Appellant has thus failed to use available administrative means to arrange for the appearance of witnesses as provided by the Civil Service Commission Regulations. *See* 5 C.F.R. § 22.607 (rev. 1961).

Affirmed

[fol. 150]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961. Civil 1699-60

No. 16,345

DANIEL ALTON WILLIAMS, APPELLANT

v.

EUGENE M. ZUCKERT, Secretary of the Department of the Air Force, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

Before: Washington, Danaher and Burger, Circuit Judges.

JUDGMENT—Nov. 9, 1961

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: Nov. 9, 1961

[fols. 151-152] * * * *

[fol. 153] CLERK'S CERTIFICATE
(omitted in Printing)

[fol. 154]

SUPREME COURT OF THE UNITED STATES

* * * *

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

March 12, 1962.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States.

Dated this 6th
day of February, 1962.

[fol. 155]

SUPREME COURT OF THE UNITED STATES

• • • •

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—May 21, 1962

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 988 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

May 21, 1962

Mr. Justice Frankfurter took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE 1962 656243 201

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FILED
OCT 18 1962
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 133

DANIEL ALTON WILLIAMS,

Petitioner,

—v.—

EUGENE M. ZUCKERT, Secretary of the Air Force, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

DAVID I. SHAPIRO
1411 K Street, N.W.
Washington 5, D. C.
Attorney for Petitioner

SIDNEY DICKSTEIN,
Of Counsel

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 133

DANIEL ALTON WILLIAMS,

Petitioner,

—v.—

EUGENE M. ZUCKERT, Secretary of the Air Force, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The district court rendered no opinion. The opinion of the Court of Appeals is reported at 296 F.2d 416.

Jurisdiction

The judgment of the Court of Appeals was entered on November 9, 1961 (R. 102). On February 6, 1962, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to March 12, 1962 (R. 103). The petition was filed on March 7, 1962, and was granted on May 21, 1962 (R. 104).[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

[1] A motion for leave to proceed *in forma pauperis* was filed and granted on the same dates (R. 104).

Question Presented

Where the issue on a veteran's appeal to the Civil Service Commission turns on the credibility of the witnesses against him and the employing agency admits command and control of those witnesses, do the provisions of Section 14 of the Veterans Preference Act and 5 C.F.R. §22.601, *et seq.*, authorize the employing agency to refuse to produce such witnesses at the hearing and to rely on their affidavits instead?

Statute and Regulations Involved

The pertinent portions of Section 14 of the Veterans Preference Act, 58 Stat. 390, 5 U.S.C. §863, and the pertinent Regulations of the Civil Service Commission, 5 C.F.R., Part 22, are set forth in Appendix A, *infra*.

Statement of the Case

Petitioner, a permanent civil service employee with sixteen years of service (including periods of active and honorable military duty with the United States Air Force), was employed as a Recreational Supervisor at the Air Force Academy in Colorado Springs, Colorado (R. 4). On March 11, 1959, the Air Force issued a notice proposing petitioner's suspension and removal on grounds of attempted homosexual assaults upon three airmen and wilful damage to government property (R. 4-5, 16-17).[2] Two of the alleged attempted assaults were alleged to have

[2] Prior thereto, and on March 6, 1959, the Air Force Academy issued an order prohibiting petitioner from entering the academy grounds (R. 5). The order was made effective as of March 10, 1959 and remained continuously in effect during the entire processing of petitioner's proposed suspension and removal (R. 5-6, 18-19).

occurred while petitioner was on active duty with the Air Force and the third was alleged to have occurred while petitioner was a civilian employee at the Air Force Academy (R. 5).

Although petitioner denied and refuted the charges (R. 13, 20-28), he was placed in suspension status on March 13, 1959 (R. 29-30), and was discharged and removed from his position at the Air Force Academy on April 12, 1959 (R. 31-32). The departmental proceedings prior to removal afforded petitioner no hearing of any kind, nor any opportunity to confront and cross-examine the accusing witnesses.

Petitioner appealed to the Civil Service Commission under Section 14 of the Veterans' Preference Act (R. 7). On May 5, 1959, the Tenth Civil Service Region held a hearing to take evidence of petitioner's alleged misconduct. Petitioner repeatedly requested an opportunity to interrogate three airmen, two of whom were alleged victims of the homosexual attempts and who were then stationed at the Air Force Academy (R. 44, 47, 48). These requests were rejected (R. 7-8, 38, 44). The Air Force submitted its evidence against petitioner in affidavit form (R. 39, 51), and while admitting its ability to produce all three airmen, declined to do so on the grounds that: (1) "any testimony they could give would be repetitious" of their accusations; (2) "knowing the character and reputation of the airmen who were concerned in this matter, it is firmly believed that even had the officials of the Air Force Academy deemed it necessary for them to attend, neither [petitioner nor his counsel] could have discredited them upon cross-examination"; and (3) "there is a possibility that they could have made even more damaging statements about [petitioner's] conduct and behavior" (R. 85).

The Tenth Civil Service Region upheld the Air Force's refusal to produce the airmen. And despite petitioner's denial of the alleged acts of misconduct and the evidence which he proffered, including an attack on the credibility of his accusers (R. 44-45), petitioner's removal was sustained (R. 8, 39-41). In resolving the conflicting evidence against petitioner, the Regional Director stated:

> " • • • it is inconceivable that three different persons on three different occasions at wide intervals of time would make ficticious accusations of homosexual attempts against them by the same person unless such attempts did in fact occur. For this reason the conflicts in evidence as to whether or not [petitioner] made the homosexual attempts is resolved in favor of the U. S. Air Force Academy" (R. 39).

Petitioner then appealed to the Commission's Board of Appeals and Review (R. 50-55). The Board adopted the Regional Director's rationale and affirmed his decision (R. 56-59).[3]

Petitioner commenced this action *pro se* on June 6, 1960, by filing a complaint in the United States District Court for the District of Columbia (R. 1). On January 17, 1961, after a notice of appearance by counsel, an amended complaint was filed asserting jurisdiction under District of Columbia Code, §§11-305 and 11-306; 28 U.S.C. §§1331, 1332, and 2201; 5 U.S.C. §863, and the Fifth and Sixth Amendments to the Constitution of the United States (R. 3).

Subsequently, both sides moved for summary judgment. On March 14, 1961, the district judge granted respondents'

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[3] The Board of Appeals and Review failed to sustain the charge that petitioner had wilfully damaged government property (R. 58).

motion and dismissed the complaint (R. 68). On March 30, 1961, petitioner filed a notice of appeal to the United States Court of Appeals (R. 69). On November 9, 1961, the Court of Appeals affirmed the district court's order (R. 100-101).

Summary of Argument

The sole question presented by this case is whether a Government employee can be denied an opportunity to confront and cross-examine his accusers during a hearing before the Civil Service Commission in proceedings challenging his removal from employment under Section 14 of the Veterans Preference Act, 58 Stat. 390, 5 U.S.C. §863. The employing agency, in this case the Air Force, admitted that the three key witnesses to petitioner's alleged misconduct were all airmen on active duty, and subject to its military control. Yet, it refused to produce them before the Tenth Civil Service Region because it unilaterally concluded that their testimony would not have aided petitioner's case (R. 85). The Court of Appeals held, on the authority of *Devine* v. *Campbell* (C.A.D.C.), 194 F.2d 876, certiorari denied, 344 U. S. 826 (1952), that the "failure of the Air Force to produce such witnesses here can in no way be viewed as a denial of [petitioner's] statutory and procedural rights" (R. 101).

I.

The decision below was erroneous. Section 14 of the Veterans Preference Act, 5 U.S.C. §863, as distinguished from Section 6(a) of the Lloyd-Lafollette Act, as amended, 62 Stat. 354, 5 U.S.C. §652(a), requires the Government to produce for cross-examination the persons whose affidavits supplied the factual basis for dismissal. So much is clear from the legislative history of Section 14 of the

Veterans Preference Act and the Civil Service regulations (5 C.F.R. §22.601, *et seq.*) promulgated by the Commission.

II.

It is now settled that if dismissal from Government employment be based on a defined procedure, even though generous beyond the requirements that bind the agency, that procedure must be scrupulously observed. *Service* v. *Dulles*, 354 U. S. 363 (1957). Since the Civil Service regulations which governed petitioner's appeal (5 C.F.R. §22.601, *et seq.*), required the Air Force to produce at the appeal hearing the witnesses whose affidavits formed the basis for petitioner's removal, it is plain, wholly apart from the requirements of the statute, that petitioner's removal was invalid. *Vitarelli* v. *Seaton*, 359 U. S. 535, 544-545 (1959).

ARGUMENT

I.

In *Deviny* v. *Campbell* (C.A.D.C.), 194 F.2d 876, certiorari denied, 344 U. S. 826 (1952), the Court of Appeals for the District of Columbia held that neither Section 14 of the Veterans Preference Act nor the regulations governing employee appeals to the Civil Service Commission required the employing agency to produce witnesses to testify in support of the charges and that it could submit affidavits or statements from such persons instead. This interpretation of the statute and applicable Civil Service regulations (5 C.F.R. §22.601 *et seq.*) has been followed by the court below in this (R. 101) and other cases.[4]

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[4] *E.g.*, *Green* v. *Baughman* (C.A.D.C.), 243 F.2d 610, 613, certiorari denied, 355 U. S. 819 (1957); *Ellis* v. *Mueller* (C.A.D.C.), 280 F.2d 722, certiorari denied, 364 U. S. 833 (1960); *Shields* v. *Sharp* (C.A.D.C.), Appeal No. 15666 certiorari denied, 366 U. S. 917 (1961).

The holding of *Dering* that nothing in the Veterans Preference Act "indicates an intention to require a hearing of the adversary type, with compulsory confrontation by witnesses" (194 F.2d at 880) is based on a misreading of the Congressional purpose. Section 14 of the Veterans Preference Act, although modeled on Section 6 of the Lloyd-Lafollette Act of 1912, 37 Stat. 555, 5 U.S.C. §652, was designed to provide "special preferences to veterans". *S. Rep. 907*, 78th Cong., 2d Sess., 3 (1944); *H. R. Rep. No. 1289*, 78th Cong., 2d Sess., 4 (1944); 90 Cong. Rec. 3503 (1944).[5] Instead of notice of the charges preferred, Section 14 required notice with reasons 30 full days in advance of the proposed removal.[6] And instead of an opportunity to "personally [answer the charges] in writing", the veteran's answer could be made personally as well as in writing. Most important, the new act eliminated the Lloyd-Lafollette provision making cross-examination of witnesses, trial, or a hearing a matter for the discretion of the removing officer, and substituted therefor, an appeal to the Civil Service Commission with the right to make an appearance either personally or by representative.

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[5] It was first introduced as Section 9 of H. R. 6497, 75th Cong., 1st Sess. (1937); reintroduced as Section 9 of H. R. 5147, 76th Cong., 1st Sess. (1939), and finally introduced and passed as Section 14 of H. R. 4115, 78th Cong., 2nd Sess. (1944). The legislation which was enacted in the 78th Cong. represented a compromise between the versions sponsored by the three major veterans organizations in the prior congresses. *Hearings before Senate Committee on Civil Service on S. 1762 and H. R. 4115*, 78th Cong., 2nd Sess., 8 (1944). Section 14 of H. R. 4115, 78th Cong., 2d Sess. (1944) was the version originally sponsored by the Veterans of Foreign Wars as Section 9 of H. R. 6497, 75th Cong., 1st Sess. (1937). *Hearings before House Committee on Civil Service on H. R. 5558, H. R. 5821 and H. R. 6497*, 75th Cong., 1st Sess., 95 ff. (1937).

[6] *Stringer* v. *United States* (C. Cls.), 90 F. Supp. 369.

[7] *Washington* v. *United States* (C. Cls.), 147 F. Supp. 284, certiorari dismissed, 335 U. S. 801 (1957).

The meaning of the appeal provision was explained when Section 14 of the Veterans Preference Act was first before Congress in 1937.[8] The legislative representative of the Veterans of Foreign Wars testified that the "purpose of that [section], as is apparent, is to prevent any man from being let out without good cause shown, and he would be let out only after a proper hearing. * * * It would protect veterans from being discharged for, shall I say, personal reasons, and on the other hand, it will not absolutely prohibit a supervisory officer from discharging a man for cause, but it does give the veteran an opportunity to defend himself by trial." *Hearings before the House Committee on H. R. 5558, H. R. 5821 and H. R. 6497*, 75th Cong., 1st Sess., 118 (1937).[9]

The contemporaneous administrative construction of Section 14's appeal provision is set forth in the Civil Service regulations, which are substantially the same now as when first issued,[10] and which contemplate an adversary type of administrative hearing at the appeal level. Cf. *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959). These regulations provide that the "employee has a right to appear at the hearing on his appeal * * * ", that the "agency has a right to participate in such a hearing", and that "[b]oth parties shall have the right to produce witnesses" (5 C.F.R. §22.601); that "[o]pportunity will be afforded for the introduction of evidence (including testimony and statements by the employee * * * and witnesses and by representatives of the agency and its witnesses) and for the cross-examination of witnesses" (5 C.F.R. §22.603); and that "testimony at hearings shall be under oath" (5 C.F.R. §22.605).

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[8] *Op. cit. supra*, ftn. 5.

[9] See also *Hearings before House Committee on Civil Service on H. R. 5101 and H. R. 5147*, 76th Cong., 1st Sess., 69-70 (1939).

[10] See Departmental Circular No. 507, issued November 4, 1944.

The contemporaneous administrative construction, as set forth above, was ignored when the court below, following *Devine* v. *Campbell* (194 F.2d, at 879), concluded that, inasmuch as 5 C.F.R. §22.607 provided that the Commission "is not authorized to subpoena witnesses" and that the employee and the employing agency "must make their own arrangements for the appearance of witnesses", the failure to produce witnesses at the hearing in no way violated petitioner's rights (R. 101). This interpretation of 5 C.F.R. §22.607 is erroneous. Section 22.607 of the Commission's regulations must be read together with §22.601, which provides that both the employee and the agency have a right to participate in the appeal hearing and that "[b]oth parties shall have the right to produce witnesses." When so read, §22.607 means that, since the Commission is not authorized to subpoena witnesses, the employee and the employing agency must make their own arrangements for the appearance of *their own* witnesses. Otherwise, the regulations providing opportunity "for the cross-examination of witnesses" (5 C.F.R. §22.603) and requiring that "testimony at hearings shall be under oath" (5 C.F.R. §22.605) would be rendered meaningless, as in large part they have been since *Devine* v. *Campbell* was decided.

The statute, the legislative history, and the contemporaneous administrative construction by the Civil Service Commission, all demonstrate that Congress intended to provide "additional" and "special" preferences for veterans[11] and that Section 14 of the Veterans Preference Act, as distinguished from Section 6(a) of the Lloyd-Lafollette Act, 5 U.S.C. §652(a), requires the Government to produce for cross-examination the persons whose affidavits supplied the factual basis for dismissal.

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[11] *Hilton* v. *Sullivan*, 334 U.S. 323, 338-339 (1948).

II.

In the court below, petitioner contended that, apart from the provisions of the statute, the Air Force was required by 5 C.F.R. §22.601, *et seq.*, to produce at the hearing the three airmen who submitted the affidavits upon which the Air Force relied, and on whose credibility petitioner's removal turned (R. 8, 39, 58). All three airmen were on active duty, subject to control of the Air Force (R. 44), but were not produced to testify, because, *in the judgment of the Air Force*, their affidavits could not be impeached on cross-examination (R. 85). The court below held, on the authority of *Deviny* v. *Campbell*, that the Air Force was not required to produce them (R. 101).

In the decade since *Deviny* was decided, this Court has evolved the rule that, if dismissal from government employment be based on a defined procedure, even though generous beyond the requirements that bind the agency, that procedure must be scrupulously observed. *Service* v. *Dulles*, 354 U. S. 363 (1957). "This judicially evolved rule of administrative law is now firmly established * * *". *Vitarelli* v. *Seaton*, 359 U. S. 535, 547 (1959).[12]

The regulations promulgated by the Civil Service Commission under Section 14 of the Veterans Preference Act, and which governed petitioner's appeal to the Commission (5 C.F.R. §22.601 *et seq.*), required the Air Force to produce at the hearing the three witnesses whose affidavits formed the basis upon which petitioner's removal was upheld. So much is apparent from *Vitarelli* v. *Seaton*, 359 U. S. 535, 544-545 (1959), where this Court construed Section 21(c)(4) of Interior Department Order 2738 (which gave an employee the right to "cross-examine any wit-

[12] Frankfurter, Clark, Whittaker and Stewart, JJ., dissenting in part.

ness offered in support of the charges"), as requiring the Interior Department to call as witnesses all "non-confidential informants" who furnished information against the employee upon which the agency relied. In the instant case, Section 22.603 of the Commission's regulations provides that, during the hearing, "opportunity will be afforded for the introduction of evidence (including testimony and statements by the employee and his designated representative and witnesses and by representatives of the agency and its witnesses) and for the cross-examination of witnesses." (5 C.F.R. §22.603).

As matters now stand, the *Devine* rule makes veterans appeal hearings before the Commission, where both parties are granted the right to produce witnesses, introduce evidence, and cross-examine witnesses, into hearings where the employee submits his evidence by testifying under oath, and the employing agency submits its evidence by furnishing affidavits. The effect of *Devine*, therefore, has been to write the provision of 5 C.F.R. §22.603, granting the employee opportunity "for the cross-examination of witnesses", out of the regulations entirely.

The foregoing makes clear that this case is controlled by *Vitarelli* v. *Seaton* and that, wholly apart from the requirements of the statute, petitioner's removal was taken in violation of 5 C.F.R. §22.601, *et seq.*

CONCLUSION

By reason of the foregoing, the judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX A

Veterans' Preference Act, as amended, 58 Stat. 390, 5 U.S.C. §863:

> Discharge, suspension, etc., only for cause; reason in writing; advance notice; personal appearance; findings and recommendations.
>
> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit

its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further*, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title.

Title 5, Chapter 1—Civil Service Commission Part 22—"Appeals of Preference Eligibles under the Veterans' Preference Act of 1944" (5 C.F.R. §22):

Subpart C—Employee Appeals

§22.301. Right of appeal. An employee may appeal to the Commission from any decision of an administrative officer to take adverse action.

Subpart D—Commission Action on Initial Appeal

§22.402. Right to a hearing. The employee shall have a right to a hearing before the office of the Commission undertaking initial adjudication of his case. This shall be the only opportunity for hearing as a matter of right. The employee shall be advised of his right to a hearing and shall express his desire in writing.

Subpart F—Hearings

§22.601. Right to appear at hearing. An employee has a right to appear at the hearing on his appeal, personally or through or accompanied by his representative, before the office of the Commission handling the appeal. The agency has a right to participate in such a hearing. Both parties shall have a right to produce witnesses.

§22.602. How conducted. The hearing will be informal and will be conducted by a representative of the Commission.

§22.603. Introduction of evidence. Opportunity will be afforded for the introduction of evidence (including testimony and statements by the employee and his designated representative and witnesses and by representatives of the agency and its witnesses) and for the cross-examination of witnesses.

§22.604. Rules of evidence. Rules of evidence will not be strictly applied during hearings, but the Commission representative in charge of the hearing shall use reasonable discretion to exclude irrelevant or unduly repetitious testimony.

§22.605. Testimony taken under oath; record of hearings. The testimony at hearings shall be under oath. The office of the Commission handling the appeal shall determine how the hearing will be recorded. If the hearing is recorded verbatim, the reporter's transcript shall be made a part of the record of the proceeding and a copy shall be furnished to each party. When the hearing is not recorded verbatim, the presiding officer shall make a suitable summary of pertinent portions of the testimony. When agreed to in writing by all parties concerned, the summary shall constitute the report of the hearing and shall be made a part of the record. A copy shall be furnished to each party. Should the presiding officer and the parties fail to agree on the summary, the parties shall be permitted to submit, in writing, exceptions to any part of the summary. Such exceptions shall be considered in connection with the making of the finding and recommendation.

§22.606. Limitation on attendance at hearings. Hearings shall not be open to the general public or the press. Attendance shall be limited to persons determined by the Commission to have a direct connection with the appeal.

§22.607. Appearance of witnesses. The Commission is not authorized to subpoena witnesses. The employee and his designated representative, and the employing agency, must make their own arrangements for the appearance of witnesses.

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S. Rep. No. 631, 80th Cong., 1st Sess.	39

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 133

DANIEL ALTON WILLIAMS, PETITIONER

v.

EUGENE M. ZUCKERT, SECRETARY OF THE AIR FORCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The district court rendered no opinion. The opinion of the court of appeals (R. 100–101) is reported at 296 F. 2d 416.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1961 (R. 102). By order of February 6, 1962, Mr. Justice Stewart extended the time for filing the petition for a writ of certiorari to and including March 12 (R. 103). The petition was filed on March 7, and was granted on May 21, 1962 (R. 104). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

In accordance with applicable procedures, the Air Force removed petitioner from his position as a civilian employee. Petitioner, a veteran, thereafter exercised his right to appeal this action to the Civil Service Commission.

The question presented is whether the Veterans' Preference Act and the regulations thereunder made it petitioner's obligation, in the proceedings before the Commission, to arrange for the appearance of all witnesses (including adverse witnesses) whom he wished to examine or cross-examine.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Veterans' Preference Act, 58 Stat. 390, 391, as amended, 5 U.S.C. 863, 868; the Lloyd-LaFollette Act, 37 Stat. 555, as amended, 5 U.S.C. 652(a); and the Regulations of the Civil Service Commission, 5 C.F.R. Part 22; are contained in the Appendix, *infra*, pp. 43–49.

STATEMENT

Petitioner was employed by the United States Air Force on October 13, 1958, as a civilian Recreation Supervisor (Social Activities and Services) at the Air Force Academy's Service Club, which is located on the Academy grounds, north of Colorado Springs, Colorado (R. 35, 4, 94). His duties in that position brought him into frequent contact with cadets and personnel employed at the Academy (R. 48, 25). This case arises out of the removal of petitioner from his position because of three separate homosexual assaults

on three different persons prior to and during the period of his employment.

A. The removal and administrative appeal procedures provided by statute and regulation.—The basic statute governing the removal of federal employees from their positions in the classified civil service is Section 6(a) of the Lloyd-LaFollette Act, 5 U.S.C. 652(a), *infra*, p. 45. That section provides that "No person in the classified civil service * * * shall be removed * * * except for such cause as will promote the efficiency of such service and for reasons given in writing." It says that the employee shall be given notice of the proposed removal and of any charges, provided with a copy of such charges, allowed a reasonable time for filing a written answer with affidavits, and furnished a written decision on his answer. The Act specifies, however, that "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer" removing the employee.

The regulations of the Civil Service Commission implementing the Lloyd-LaFollette Act set forth in detail the procedures to be followed in effecting a removal. They provide that an employee may request the Commission to investigate his case in order to determine whether there were procedural irregularities in his removal or whether the removal was made because of political reasons or discrimination resulting from marital status or physical handicap. 5

C.F.R. 9.106 (b) and (c).[1] If the employee alleges discrimination because of race, color, religion, or national origin, he has a right to an appeal to the President's Committee on Government Employment Policy and on such an appeal the burden of coming forward with sufficient evidence rests upon the agency, not the employee. 5 C.F.R. 401.8 and 401.9. Except in cases under the Veterans' Preference Act, the Commission does not review or investigate the sufficiency of the reasons for the removal—that is, the merits of the decision. 5 C.F.R. 9.106(a). At the time of petitioner's removal, neither the Lloyd-LaFollette Act nor the regulations under it required any kind of a hearing for the employee either prior to his removal or during the Civil Service Commission proceedings.[2]

The Veterans' Preference Act (5 U.S.C. 851, *et seq.*) establishes additional procedural protection for "permanent or indefinite" civil service employees who have

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[1] Until recently, the Commission had discretion whether to make an investigation. However, on January 11, 1961, the Commission adopted new regulations granting an employee the right to appeal to the Commission on the grounds which previously gave the Commission discretion to order an investigation. 26 Fed. Reg. 181, *et seq.*; 5 C.F.R. 9.301–9.307 (Cum. Pocket Supp., 1962). On January 19, 1962, the President by Executive Order No. 10988, directed that non-veterans be given procedural rights equal to veterans (27 Fed. Reg. 551–556), and on May 19, 1962, the Commission promulgated regulations effecting that result (27 Fed. Reg. 4759–4762).

[2] The Air Force, like many federal agencies, has adopted a grievance procedure which grants the employee a hearing at his request, and which encourages all witnesses who are Air Force employees to appear. Air Force Manual 40–1, Grievance Proceedings, ¶ 9. A request from the employee for the appearance of a witness may be honored by the grievance committee, but that committee has no authority to compel anyone to testify. *Id.*, ¶ 10 g, h.

served in the armed forces in time of war or in a foreign campaign, and have been separated from the service under honorable conditions. Before such an employee may be removed, the Veterans' Preference Act provides that he shall have thirty days' written notice of the proposed action, setting forth the reasons "specifically and in detail" and that he shall have "a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer." 5 U.S.C. 863, *infra*, p. 43. The Act also gives the covered employee "the right to appeal to the Civil Service Commission" from any removal or other adverse decision and "the right to make a personal appearance" in accordance with reasonable rules and regulations issued by the Commission. *Ibid.* The Act further provides for "investigation" by the Commission and "consideration of the evidence submitted," and makes the Commission's decision binding upon the agency. *Ibid.* The Administrative Procedure Act does not apply to these proceedings since it specifically excepts cases involving removal of federal employees. 5 U.S.C. 1004, 1006.

The Civil Service Commission has issued regulations implementing these provisions of the Veterans' Preference Act. 5 C.F.R. Part 22, *infra*, pp. 45-49. On the employee's appeal from any adverse agency action, the regulations require investigation by the Commission "to develop the facts and circumstances relative to the adverse decision" (5 C.F.R. 22.401(a)), and provide that statements thereby obtained "shall be by affidavit, when practicable" (5 C.F.R. 22.401(b)). Information developed by the Commission's investigation is made

available both to the employee and the agency. 5 C.F.R. 22.401. Pursuant to his statutory right to make a personal appearance on the appeal to the Commission, the regulations give the employee a right to a "hearing" (5 C.F.R. 22.402, 22.501–22.607), which is "informal" (5 C.F.R. 22.602). At this proceeding, the rules of evidence are not strictly applied (5 C.F.R. 22.604), and opportunity is to be afforded to the appealing employee and the agency to introduce evidence and "for the cross examination of witnesses" (5 C.F.R. 22.603). The employee has the burden of prosecuting the appeal, and his failure to do so may result in its dismissal. 5 C.F.R. 22.305. Since the Commission is not authorized to subpoena witnesses, the regulations specify that the employee and the agency "must make their own arrangements for the appearance of witnesses." 5 C.F.R. 22.607. The regulations also provide for an appeal from the initial decision by the Commission's hearing examiner to the Board of Appeals and Review, whose decision becomes that of the Commission. 5 C.F.R. 22.501–22.504.

B. The proceedings arising from petitioner's removal.—On March 6, 1959, petitioner was given thirty days' notice of proposed action to remove him from his position with the Air Force Academy because of an "[a]ttempted homosexual act with an airman of the Air Police Squadron" on February 11, 1959, at Colorado Springs. This allegation was supported by a sworn statement of Airman Patrick Ryan (the man allegedly assaulted) taken from the files of the Provost Marshal's office (R. 11–12, 71–75). Petitioner denied

the charge and asked for a "bill of particulars" so that he could answer the allegations (R. 43).

A new thirty-day notice of proposed removal was issued to petitioner on March 11, 1959, rescinding the earlier notice. The new notice stated as reasons for the proposed removal attempted homosexual assaults: (1) upon Airman Robert Carwithen on November 30, 1957, in Room 403, Colorado Hotel, Denver; (2) upon Sergeant Alton Tyler, on May 10, 1958, on a roadside between Blackhawk, Colorado, and Lowry Air Force Base; and (3) upon Airman Patrick Ryan on February 11, 1959, at 607 North Spruce Street, Colorado Springs (R. 16). In addition, petitioner was charged with willfully damaging a government typewriter at the Service Club on March 4, 1959 (R. 16–17). This notice was based on the original affidavit of Airman Ryan, and additional affidavits by Airman Ryan, Sergeant Tyler, Airman Carwithen, and two other members of the Air Force (R. 75–81, 92–93, 96–99). The letter notified petitioner of his proposed suspension from active duty, and advised him of his rights to reply to the charges personally and in writing, and to produce affidavits or other evidence in support of his reply (R. 17).

Petitioner did not avail himself of his right to answer the charges, in person, before the removing officer. Instead, he denied the charges in a letter dated March 11, 1959, which set forth at length his version of what had happened on each of the occasions in question (R. 20–28). He submitted no affidavits or other evidence in support of his position, and made no request to confront or cross-examine his

accusers. In his letter of March 11, he conceded in effect that he was alone with each of the men on the occasion named, but contended that: (1) Carwithen lied because he wanted revenge for petitioner's having given information to the Air Force's Office of Special Investigations about improper activities of Carwithen's girl friend; (2) Tyler lied because he "probably wanted sexual activity and none occurred"; and (3) Ryan lied to improve his record as a military policeman (R. 26–27).

After considering petitioner's letter and the absence of supporting affidavits or other evidence, the Civilian Personnel Officer of the Academy determined that petitioner had "failed to give sufficient reasons and evidence" in support of his answer, and accordingly removed petitioner from his position (R. 31–33). The personnel officer advised him of his rights to appeal the decision either within the Air Force under the Air Force grievance procedure, or to the Civil Service Commission under Section 14 of the Veterans' Preference Act and the applicable regulations (R. 32). Petitioner was also advised of his right to submit to the Commission a sworn statement supporting in detail his view of the facts, if he wished to be eligible for further employment with the federal government (R. 32; see 5 U.S.C. 863 and 864, *infra*, pp. 44–45).

Petitioner obtained counsel and took a timely appeal to the Civil Service Commission[3] (R. 35). An

[3] He apparently did not take advantage of his opportunity to present a statement in order to retain his eligibility for other employment with the federal government.

investigation was conducted by a representative of the Commission over a period of approximately fifteen days (R. 37). In addition to a sworn statement from petitioner incorporating by reference his letter of March 11 (R. 37), and the sworn statements before the personnel officer at the time of his decision to remove petitioner, the Commission investigator obtained sworn statements from Airman Ryan (R. 91–92), Airman Harris (R. 86–90), and a personnel officer (R. 95).

Petitioner then availed himself of his right to appear personally with counsel before an appeals examiner of the Commission at the Tenth Regional Office in Denver (R. 37, 42). Although petitioner was appealing from the decision of the Air Force Academy to remove him, and was present and sworn, he chose not to testify on his own behalf (R. 42–49). Petitioner's counsel opened his case by moving to strike the charges of the homosexual assaults on Carwithen and Tyler on the ground that they had nothing to do with petitioner's conduct after becoming a civilian employee (R. 43). When this motion was denied, counsel introduced an affidavit designed to impeach Carwithen's affidavit by contradicting one statement in it (R. 44).

Counsel asked the Air Force's representative (a personnel officer named Mrs. Dillon) why Airman Tyler, Ryan, and Stevens[4] had not been brought to

[4] Airman Stevens was apparently a friend of petitioner who was present at petitioner's residence with petitioner, Airman Harris, and Airman Ryan prior to the assault of February 11, 1959 (R. 23–24, 73, 88–89).

the hearing. She replied that two of the three men were stationed at Colorado Springs but that the Air Force Academy saw no need for their attendance (R. 44). Petitioner's counsel then asked if that meant that his request "for the appearance of Airmen Ryan, Stevens and Tyler was rejected," to which Mrs. Dillon replied in the affirmative (R. 44). Counsel made no inquiry about Airman Carwithen or request for his attendance, although Carwithen's sworn statement constituted the basis for the charge of petitioner's homosexual assault on him of November 30, 1957 (R. 44, 96–97). Petitioner had not requested Ryan, Tyler, and Stevens to attend the hearing, and apparently made no other effort to secure their attendance (R. 101). The refusal of the Air Force Academy to require the attendance of the airmen was not designed to, and did not in fact, preclude petitioner from obtaining their attendance (R. 8). Petitioner's counsel made no motion or request to the appeals examiner that he order the Air Force to produce the witnesses or that he strike the affidavits of the airmen, unless the Air Force produced them for confrontation and cross-examination (R. 42–49).

After receiving Mrs. Dillon's answer concerning the attendance of witnesses, petitioner's counsel asked Captain Fox, the Provost Marshal of the Academy, whether Airman Ryan had furnished a statement to him on March 11 (R. 45; see R. 92–93). Captain Fox answered affirmatively, and also stated that Ryan had made a sworn statement on February 11, immediately after the assault on that day (R. 71–75). Arrangements were made to furnish that statement

to counsel (R. 45). Counsel then directed questions to Mrs. Dillon as to her part in the removal of petitioner (R. 45). She stated that the decision to remove petitioner was based upon the affidavits of Carwithen and other airmen as to the facts of the three assaults (R. 45–47). Counsel for petitioner had nothing further to offer except an affidavit as to petitioner's general reputation (R. 45).

Since petitioner had chosen not to testify on his own behalf, the evidence in support of his appeal consisted primarily of his reply of March 11 to the notice of charges (R. 37, 20–28). The only supporting materials he introduced were the affidavit attacking a statement of Carwithen and the affidavit as to petitioner's general reputation. The other evidence before the hearing examiner, much of which had been obtained by the Commission's investigator, consisted of sworn statements of Airmen Carwithen, Ryan, and Tyler, which described in detail the circumstances and events of the homosexual assaults upon them (R. 96–97, 71–75, 91–93, 78–79). In addition, there were several sworn statements corroborating their assertions. Statements of Airmen Davis and Purcell set forth the details of homosexual "passes" or assaults made by petitioner on June 20, 1957, and January 1, 1959, respectively (R. 80–84); a statement by Airman Harris described admissions by Williams and an oral statement by Sergeant Tyler made contemporaneously with the alleged assault on him (R. 87–90); and a statement by Airman Templeton said that he had seen petitioner damaging a government typewriter (R. 75–77).

On this record the appeals examiner found that the charges against petitioner were supported by a preponderance of the evidence and resolved the conflicts in the evidence in favor of the Air Force Academy (R. 38–39). The appeals examiner ruled that the immoral acts engaged in by petitioner before his employment would, if known, have disqualified him for employment, and therefore warranted his removal (R. 39–40). Accordingly, he denied petitioner's motion to disregard the earlier immoral acts, and affirmed petitioner's removal on the basis of those acts as well as the assault of February 11, 1959, and the defacing of the typewriter (R. 39–41).

Petitioner appealed to the Board of Appeals and Review of the Civil Service Commission on the ground that he was innocent of the charges and that he had no opportunity, as allegedly required by the Sixth Amendment, to confront and cross-examine his accusers (R. 50–55). He made no contention that the Veterans' Preference Act or the Civil Service Commission's regulations conferred upon him the right to have the adverse witnesses produced by the Academy. The Board ruled that the charges of homosexual assaults were sustained by a preponderance of the evidence, and that the Sixth Amendment had no application to civil administrative proceedings (R. 56–59). It found, however, that the charge of willfully damaging the typewriter was not sustained by the evidence (R. 58). Accordingly, the Board sustained petitioner's removal entirely on the basis of the three homosexual assaults (R. 58–59).

Petitioner filed this action for a declaratory judgment that his removal was illegal and void, and for reinstatement, alleging that the amount in controversy exceeded $10,000 (R. 3–10). Petitioner alleged that the Commission's actions in crediting the evidence of the three airmen, and in permitting the Air Force to refuse to call them as witnesses, was arbitrary and capricious, and in violation of the Fifth and Sixth Amendments. He further alleged that his removal violated the Veterans' Preference Act and the applicable regulations (R. 9–10). The parties filed cross motions for summary judgment on the administrative record (R. 1, 60, 63). The district court denied petitioner's motion and granted respondents' motion without opinion (R. 68).

On appeal, petitioner contended only that the Civil Service Commission had denied him the procedural rights conferred upon him by its regulations and the Veterans' Preference Act. The violation, he argued, resulted from the Commission's failure to require the Air Force to produce Ryan, Tyler, and Stevens. Petitioner did not assert any violation of constitutional rights, nor any other procedural defect. The Court of Appeals for the District of Columbia Circuit affirmed *per curiam*. It ruled that the applicable regulation (5 C.F.R. 22.607) leaves the burden of producing witnesses at a Civil Service Commission

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[5] Although the district court does not have authority to award back pay to an improperly discharged employee (28 U.S.C. 1346(d)), its holding that a discharge was illegal would entitle the employee to back-pay.

appeal hearing "upon the party who wants them," and cited its prior decisions upholding this procedure under the regulations and the Veterans' Preference Act (R. 101).

ARGUMENT

ON AN APPEAL TO THE CIVIL SERVICE COMMISSION CONTESTING THE REMOVAL OF AN EMPLOYEE FROM GOVERNMENT EMPLOYMENT, THE VETERANS' PREFERENCE ACT AND THE APPLICABLE REGULATIONS PLACE THE OBLIGATION OF ARRANGING FOR THE APPEARANCE OF ANY WITNESSES UPON THE PARTY WHO DESIRES THEM TO TESTIFY

INTRODUCTION AND SUMMARY

Petitioner attempts (Pet. Br. 5) to characterize the proceedings on his appeal to the Civil Service Commission from his removal as a denial of an opportunity to confront and cross-examine witnesses. This, however, is not the precise issue which is before this Court. On appeal before the Civil Service Commission, petitioner knew the identity of the witnesses on whose statements the Air Force Academy (the removing agency) relied; indeed, the affidavits on which the proceeding was based had been given to him. The appeals examiner did not deny petitioner the opportunity to produce and examine them or any other witnesses. Thus, there is not the slightest indication that the Commission denied any right of petitioner to confront and cross-examine the witnesses against him.

The sole issue presented by the proceedings before the Commission, as well as the petition for certiorari, is whether, under the Veterans' Preference Act and the Commission's regulations, the removing agency or the employee had the obligation of arranging for

the appearance of any witnesses whom the employee wished to examine.[6] There is no showing, or even allegation, that the Air Force Academy acted in any way to prevent petitioner from obtaining the appearance before the examiner of the three witnesses he claims were vital for confrontation and cross-examination. On the contrary, the evidence shows that there was no design or intent on the part of any official of the Air Force Academy to preclude petitioner from an opportunity to confront and cross-examine those who gave statements against him (R. 85). Petitioner concededly did not request the witnesses to attend the hearing, and failed to explore or pursue available means for arranging for their appearance (R. 101). So far as this record shows, therefore, petitioner might have obtained the appearance of the witnesses if he had undertaken to do so. In short, the question is whether the Act and the regulations under it required petitioner or the Air Force to take the initial step of asking the three witnesses to appear.

We think it important to note several other issues which are *not* before the Court. In the first place, no constitutional issue is raised or presented. Petitioner asserted rights under the Fifth Amendment both be-

[6] Even as to this issue, it is arguable that petitioner did not properly preserve the rights claimed here by asserting them during the administrative proceedings. See *United States* v. *Tucker Truck Lines*, 344 U.S. 33. Instead of asserting rights based upon the Veterans' Preference Act and the regulations, as he does here, petitioner asserted rights solely under the Sixth Amendment to the Constitution (R. 44, 47, 55, 57), thus depriving the Civil Service Commission of the opportunity to construe its regulations and the Act as petitioner now contends they should be construed.

fore the Civil Service Commission and the district court, but abandoned that argument in the court of appeals and in this Court. Here, his claim is based entirely on the Veterans' Preference Act and the regulations.[8a] Moreover, petitioner makes no contention here that his removal was based upon race, color, religion, national origin, or political opinions. While at one point in the administrative proceedings petitioner did charge that his removal resulted from racial discrimination (R. 47), a full investigation revealed that this charge was unfounded (Supplemental Appendix to Appellees' Brief in the Court of Appeals, pp. 17–55). Petitioner expressly waived his right to a hearing on that issue (Supp. App., *supra*, p. 54), and subsequently abandoned it.

Secondly, other than the asserted lack of opportunity for confrontation and cross-examination, there is no attack upon the procedures followed. Petitioner concededly had due notice of the proposed action. He was told specifically and in detail what he was ac-

[8a] Thus, petitioner implicitly accepts the principle that a federal employee has no constitutional right to any particular procedure in his removal from his employment, and that, except for rights conferred by statute, he may be dismissed summarily and without the giving of a reason. *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 896–898. Accord, *In the Matter of Hennen*, 13 Pet. 230, 246, 259; *United States* v. *Perkins*, 116 U.S. 483; *Crenshaw* v. *United States*, 134 U.S. 99, 108; *Parsons* v. *United States*, 167 U.S. 324, 331–334; *Keim* v. *United States*, 177 U.S. 290, 293–294; *Taylor and Marshall* v. *Beckham* (No. 1), 178 U.S. 548, 575–578; *Eberlein* v. *United States*, 257 U.S. 82. At the least, there is no constitutional right involved in requiring the employee to arrange for the appearance of witnesses he desires to have testify rather than the government agency.

cused of, and was given the names and statements of those who gave evidence against him. He concededly had ample opportunity to be heard by the responsible administrative officer of the Air Force Academy and by the appeals examiner and Board of Appeals and Review of the Civil Service Commission. And these hearings included two separate opportunities to rebut the statements made against him by introducing contradictory evidence or testifying on his own behalf.

Finally, we note that petitioner asserts no rights under the Lloyd-LaFollette Act, the basic civil service statute. Indeed, petitioner expressly concedes (Pet. Br. 7, 9) that that Act, which sets forth the procedural rights of the great majority of civil service employees, does not require the government to produce for confrontation and cross-examination persons who may supply evidence adverse to the employee. This concession is compelled by the express language of Section 6(a), *infra*, p. 45, of the Act, which states that "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the [removing] officer." Any right that petitioner might have in regard to the production of witnesses, therefore, was granted as a special preference to eligible veterans by the Veterans' Preference Act or the regulation issued under it. . . .

In this brief, we will show that the Act and regulations place the obligation of arranging for the appearance of all witnesses before the Commission upon the party desiring them to testify. Indeed, the applicable regulations specifically impose this burden. 5 C.F.R. 22.607. We will then show that these regu-

lations are fully in accord with the Veterans' Preference Act, its legislative history, the uniform judicial decisions, and consistent administrative practice.

A. THE APPLICABLE REGULATIONS PROVIDE FOR THE PROCEDURES FOLLOWED BY THE COMMISSION IN THIS CASE

The regulations of the Civil Service Commission applicable to administrative appeals under the Veterans' Preference Act make clear that the agency may sustain its removal of the employee through written statements and that, if the employee wishes to produce any witnesses, the burden is on him to do so. They provide in 5 C.F.R. 22.401(b), *infra*, p. 46, that "[s]tatements of the witnesses shall be by affidavits, when practicable * * *." A further provision, 5 C.F.R. 22.603, *infra*, p. 48, states that both the removing agency and the employee shall have "[o]pportunity * * * for the introduction of evidence (including testimony and statements * * * by representatives of the agency and its witnesses) * * *." Consequently, the Civil Service Commission clearly has authority under the regulations to consider written statements as well as the testimony of witnesses. Furthermore, under a section entitled "Appearance of witnesses," the regulations state that "the employee and his designated representative, and the employing agency, must make their own arrangements for the appearance of witnesses." 5 C.F.R. 22.607, *infra*, p. 49. Thus, the employee is explicitly required to arrange for the appearance of any witness he desires to have appear. No distinction is made by the regulations as to the kind of witness involved—whether they are likely to be hostile or

friendly, whether the removing agency has relied on their written statements or not, the employee must arrange for their appearance. While 5 C.F.R. 22.603 also provides "for the cross-examination of witnesses," petitioner was not denied this right. If he had arranged for the appearance of the witness, as 5 C.F.R. 22.607 provide, he was entitled under 5 C.F.R. 22.603 to cross-examine them.

Thus, petitioner's contention that the employing agency must arrange for and produce witnesses whose presence is desired by the employee is contrary to the explicit language of the regulations. We submit that the regulations mean what they say—particularly since, as we will now show, this interpretation is consistent with the regulatory scheme governing employee appeals to the Civil Service Commission, and has been consistently followed by the Commission and by every court which has had the opportunity to consider it.

4. The regulations issued pursuant to the Veterans' Preference Act provide broadly for an investigation of the facts by the Commission—the agency with responsibility to decide the appeal. 5 C.F.R. 22.401, *infra*, pp. 46–47. The information found, like other evidence in the form of written statements, is considered by the Commission as evidence. 5 C.F.R. 22.603, *infra*, p. 48. Furthermore, the regulations state specifically that the "[r]ules of evidence will not be strictly applied" (5 C.F.R. 22.604, *infra*, p. 48) and that "[t]he hearing will be informal" (5 C.F.R. 22.602, *infra*, p. 48). It is perfectly consistent with such informal procedures for the Commission to re-

quire each party to arrange for any witnesses it desires.

The informality which characterizes the appellate hearings before the Commission also ensures that the obligation of the appealing employee to produce any witnesses on whom he relies does not work any unfairness or hardship. For if the employee desires to confront and cross-examine an adverse witness, he does not restrict the scope of his interrogation or forfeit the right to ask leading questions merely by making arrangements for the witness' appearance at the hearing. As the record of the hearing in this case reveals (R. 42–49), the employee's counsel is free at the informal hearings to interrogate all persons present on all matters having any bearing on the proceeding (with leading questions if he desires) whether or not those persons have testified for the other party.

Petitioner contends (Pet. Br. 9) that the regulations require the employee and employing agency to make arrangements only for the appearance of "their own witnesses," *i.e.*, witnesses whose testimony is likely to be favorable. He argues that otherwise it renders "meaningless" the provision of 5 C.F.R. 22.603, which affords both the employee and the agency "[o]pportunity * * * for the cross-examination of witnesses." But this distinction between friendly and hostile witnesses is inconsistent with 5 C.F.R. 22.607, which says that each party is responsible for all witnesses it desires to have appear. Moreover, the provision for the cross-examination of witnesses in 5 C.F.R. 22.603 is important under the Commission's interpretation of the regulations, because it allows

both parties the opportunity to cross-examine those persons who are produced by the other side and give testimony in person. Such witnesses are likely to be offered by the parties where there is a substantial conflict of written evidence and therefore live testimony would probably have a significant impact on the examiner.[1] At any rate, under 5 C.F.R. 22.603, the employee has an opportunity to cross-examine those witnesses whom the agency does not produce, if he is willing to undertake the burden of arranging for their appearance. Thus, 5 C.F.R. 22.603 is entirely consistent with 5 C.F.R. 22.607, and is in no sense "meaningless."

2. Consistent administrative practice in interpreting statutes and regulations is, of course, entitled to great respect. This Court has said that administrative practice is given "peculiar weight" where "it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315. Such consistent administrative practice "will not be overturned except for very cogent reasons." *Ibid.* This principle applies *a fortiori* to the interpretation of a regulation by the agency which administers it. Such an administrative regulation is "the ultimate criterion * * * which becomes of controlling weight unless it is plainly erroneous or incon-

[1] Here there was no such conflict since petitioner relied almost entirely on his own affidavit, unsupported by any corroboration, which was contradicted by affidavits of numerous other persons.

sistent with the regulation." *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413–414; *Chapman* v. *Sheridan-Wyoming Co.* 338 U.S. 621, 631.

Petitioner recognizes the weight which should be accorded to the contemporaneous administrative construction, but purports to find in it support for his position (Pet. Br. 8–9). The facts are these. The Veterans' Preference Act became law on June 27, 1944, and the Civil Service Commission almost immediately promulgated regulations under it. Those regulations—which are the only authority cited by petitioner for his argument concerning administrative practice (Pet. Br. 8)—were substantially identical to the regulations presently in force on the questions involved in this case. Compare §§ 22.8 and 22.9, 9 Fed. Reg. 13189–13191, with 5 C.F.R. 22.401–407 and 22.601–607. In particular, the 1944 regulations contained a provision requiring the appealing employee to make his own arrangements for the appearance of witnesses (§ 22.9(f), 9 Fed. Reg. 13191) in language substantially identical to the present regulation (5 C.F.R. 22.607, *infra*, p. 49). The Commission has never read those regulations to mean, as petitioner contends, that the appealing employee must make arrangement only for the appearance of witnesses friendly to him. On the contrary, the Commission, from the beginning, has interpreted them to allow the removing agency to rest its case on written statements and to impose on the appealing employee the burden of making his own arrangements for the appearance of all witnesses he wishes to be pres-

ent, including witnesses who have supplied evidence adverse to him.[8]

This Court recently gave great weight to an administrative interpretation of agency procedural regulations which had been applied in only nine proceedings. *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408–409. The Civil Service Commission's interpretation of its regulations has been applied in literally thousands of proceedings under the Veterans' Preference Act, and, as we show below, has been sustained by every court which has considered the regulations. This interpretation, which conforms to the natural reading of the regulations, is conclusive here.

3. The two courts which have been called upon to construe the regulations governing employee appeals to the Civil Service Commission under the Veterans' Preference Act have invariably sustained the Commission's interpretation of its regulations.[9] They

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[8] Since petitioner never asserted any rights based upon the regulations before the Civil Service Commission (instead he relied entirely on constitutional arguments which he has since abandoned (see *supra*, pp. 9–10, 12)), the decisions of the hearing examiner and Board of Appeals and Review contain no reference to the Commission's practice. We have been advised by letter that the Commission's consistent practice and interpretation of its regulations were followed in this case. See App. B, *infra*, pp. 50–51.

[9] Prior to the enactment of P.L. '87–748, 76 Stat. 744, in October of this year, suits arising out of an assertedly illegal discharge under the Veterans' Preference Act could be brought either in the District Court for the District of Columbia or in the Court of Claims. See *Blackmar* v. *Guerre*, 342 U.S. 512. Under the new legislation, federal officials may be sued and served in the district in which the plaintiff resides.

have held, as we argue, that the regulations place upon the employee the obligation of arranging for the appearance of any witnesses he decides to have testify, including persons on whose written statements the removing agency relies.

In *Deviny* v. *Campbell,* 194 F. 2d 876 (C.A. D.C.), certiorari denied, 344 U.S. 826, the employee requested the presence at the hearing of adverse witnesses who were employees of the agency which removed him. The employee asserted that the Commission's failure to require the attendance of two of these witnesses deprived him of the right to cross-examination. 194 F. 2d at 879. Pointing to a section of the regulations virtually identical with the present 5 C.F.R. 22.607, *infra,* p. 49 [10] which requires each party to make arrangements for the appearance of witnesses, the court of appeals said that "it is plain" that the refusal of the Commission to require the presence of the hostile witnesses did not violate its regulations, and that those regulations did not require or contemplate "an adversary proceeding and the compulsory attendance of witnesses for cross-examination." 194 F. 2d at 879. The Court of Appeals for the District of Columbia Circuit followed *Deviny* v. *Campbell* in *Green* v. *Baughman,* 243 F. 2d 610, 613,

[10] The other regulations in effect at that time were also substantially the same as those presently in force with regard to the procedure sto be followed in the appellate hearing before the Commission. Compare §§ 22.8 and 22.9, 9 Fed. Reg. 13189–13191, with 5 C.F.R. 22.401–407 and 22.601–607.

certiorari denied, 355 U.S. 819, and has continued to follow it since that date.[11]

The Court of Claims has also upheld the Commission's interpretation of the regulations. In addition to the reasons set forth the District of Columbia Circuit, the Court of Claims has emphasized the grant of investigatory powers to the Commission and the appellate nature of its proceedings. In keeping with its conclusion that adversary trial-type procedures were not contemplated, it has ruled that the Commission may act upon affidavits and statements of persons who have not been produced for cross-examination. *Atkinson* v. *United States*, 144 C. Cls. 585, 598–601. "Proceedings before the Civil Service Commission and its regional agencies," it has declared, "need not be cast in the mold of court proceedings." *Id.* at 599. Similarly, in a later case the Court of Claims has upheld the Commission's refusal to require the employing agency to produce for confrontation and cross-examination two of its employees who had given evidence against the appealing employee. *Horn* v. *United States*, 177 F. Supp. 438, 439–440.

Petitioner has cited no decisions interpreting the applicable regulations which support his interpretation, and we have found none. In the absence of direct authority, petitioner relies principally upon this Court's decision in *Vitarelli* v. *Seaton*, 359 U.S. 535.

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[11] We have made no effort to collect the numerous unreported decisions sustaining the Commission's procedures on administrative appeals under the Veterans' Preference Act, since petitioner concedes (Pet. Br. 6) that *Devine* has been consistently followed in the courts in the District of Columbia.

There, this Court held a dismissal from federal employment for security reasons unlawful because, *inter alia*, the applicable regulations contemplated the calling of non-confidential informants to testify in person against the accused, and the statement of one such informant was used although he was not called by the removing agency to testify or be cross-examined. *Id.* at 544-545. The decision in *Vitarelli* is inapplicable here, however, because the proceedings and regulations in that case—those of the Department of the Interior governing discharges for security reasons—were wholly unlike those of the Civil Service Commission.

The sole ground for this Court's holding in *Vitarelli* that the regulations had been violated by the reliance on an informant who was not present to be cross-examined is as follows (359 U.S. at 544, note 6):

> This reading of the provision is supported by § 21(c) of the Order, which provides in part that "if the employee is or may be handicapped by the nondisclosure to him of confidential information or by lack of opportunity to cross-examine confidential informants, the hearing board shall take that fact into consideration," thus implying that the employee is to have the right to cross-examine nonconfidential informants who provide material taken into consideration by the board.

The regulations of the Civil Service Commission contain no comparable provision. Instead, as noted above, 5 C.F.R. 22.607 imposes upon the employee the burden of producing witnesses whose presence

he desires. Since the basis for the holding in *Vitarelli* is absent in the Commission's regulations, the rationale of that decision is inapplicable.[12]

4. There are no facts peculiar to this case which warrant any departure from the procedures established by the clear language of the regulations and their consistent administrative and judicial construction. The established procedures governing the ad-

[12] In addition, there are several other important distinctions between the Department of Interior regulations involved in *Vitarelli* and those of the Commission here. First, the hearing provided by the Department of Interior regulations took place prior to any decision to remove the employee, and the decision was to be made by the Secretary of the Interior upon the recommendation of the security hearing board. Section 21(k) of Dept. of Interior Order 2738, Brief for the Respondents in No. 101, Oct. Term, 1958, p. 45. Here, as we will see (pp. 33–34), the action of removal has already been taken by the Air Force and the proceeding before the Commission is on appeal. Thus, in *Vitarelli*, unlike in this case, there was no administrative decision to overturn, with its presumption of correctness.

Second, under the regulations of the Department of the Interior, the hearing board had no authority comparable to that of the Civil Service Commission (5 C.F.R. 22.401) to make an independent investigation to obtain relevant evidence in the form of affidavits or otherwise. The former proceedings, therefore, were much more like a traditional adversary hearing than the proceedings before the Commission.

Third, the regulations in *Vitarelli* required the hearing board to "reach its conclusions and base its determination on the transcript of the hearing, together with such confidential information as it may have in its possession." Section 21(k), *supra*. This provision indicated that written statements, not being a part of the transcript, could not be considered unless they were from confidential informants. No similar provision is included in the Civil Service Commission's regulations. Instead, 5 C.F.R. 22.603 allows the consideration of written statements by the Commission (see *supra*, pp. 17–18).

ministrative appeal were fair to petitioner. They provided him with ample opportunity to show that the initial administrative determination was in error; they did not foreclose the right to examine and cross-examine witnesses.

The fact that both of the witnesses whom petitioner requested the Academy to produce were in the Air Force does not warrant any departure from the procedures set forth in the regulations.[13] Petitioner does not, and could not on this record, suggest that the Air Force Academy precluded him from arranging for the appearance of those witnesses. No coercion or influence was exerted by the Academy against the airmen to prevent their appearance. Thus, if petitioner had undertaken to make the arrangements for their appearance, the record contains no indication that the witnesses would not have appeared. All that is known is that petitioner, for reasons which have never been disclosed or even suggested, made no effort even to ask the witnesses to attend the hearing. There is no occasion to consider the situation which would have been presented if petitioner had shown that he was unable to arrange for their appearances.[14]

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[13] Several of the decided cases involve refusals by the Commission to require the appearance of employees of the agency which removed the appealing employee. *Devine* v. *Campbell*, 194 F. 2d 876 (C.A. D.C.), certiorari denied, 344 U.S. 826; *Green* v. *Baughman*, 243 F. 2d 610, 613 (C.A. D.C.), certiorari denied, 355 U.S. 819; *Horn* v. *United States*, 177 F. Supp. 438 (C. Cls.).

[14] The fact that the charges against petitioner were serious does not require any departure from the procedure prescribed by the regulations. And it should be noted that removal from

Moreover, it is significant that petitioner, although present and sworn, chose not to testify in his own behalf in these civil administrative proceedings (R. 42–49). He produced no other witnesses to testify for him (*ibid.*). The only first-hand evidence supporting the petitioner's position was his own affidavit. In these circumstances, it was hardly arbitrary or surprising that the Commission decided to accept the affidavits of three apparently disinterested witnesses, when these witnesses had personal knowledge of the disputed facts, they described three unconnected incidents, and their affidavits were corroborated by the sworn statements of several other persons, instead of the affidavit of one person whose employment was at stake.

B. THE VETERANS' PREFERENCE ACT AUTHORIZED THE COMMISSION TO ISSUE THE APPLICABLE REGULATIONS

We have shown above that the Civil Service Commission regulations governing employee appeals under the Veterans' Preference Act make it the task of the appealing employee to undertake arrangements for the presence of all witnesses whom he desires to examine. Here we show that the Veterans' Preference Act itself does not give the employee a right to have the Commission arrange for the appearance

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federal civilian employment does not have as great an impact upon the employee's future as a less than honorable discharge from the military service. Compare *Harmon* v. *Brucker*, 355 U.S. 579; *Beard* v. *Stahr*, 370 U.S. 41, 43 (dissenting opinion). The reasons for a removal from civilian employment, although disclosed to prospective employers who inquire, are not made available to the general public. See, *e.g.*, Air Force Manual 40-2, Ch. 6, Sec. B.

of witnesses, and that the regulations are authorized by, and consistent with, that Act.

The Veterans' Preference Act confers upon an employee who has been removed "the right to appeal to the Civil Service Commission" and "to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission." 5 U.S.C. 863, *infra*, pp. 43–44. The Act makes no reference to any right to a hearing, to cross-examination of witnesses, or to production of witnesses. Furthermore, the Act authorizes the Commission to issue all reasonable rules in determining an employee's appeal without restricting—except for the right of the employee to make an appearance—the particular procedures to be followed. Regulations promulgated under such an authorizing provision may be overturned only if "unreasonable and plainly inconsistent with" the statutes. *Commissioner of Internal Revenue* v. *South Texas Lumber Co.*, 333 U.S. 496, 501; accord, *e.g.*, *United States* v. *Shimer*, 367 U.S. 374, 381–383; *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 90. Since the regulations issued by the Commission are clearly reasonable and not inconsistent with any statute, they are well within the authority conferred by Congress.

1. In enacting the Lloyd-LaFollette Act, which is the foundation of the classified federal civil service, Congress adopted the policy that discharges from the service must be for cause, but that the determination of cause is to be made primarily by the respon-

sible administrative officer, with limited procedural rights in the employee. It specifically provided that "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay." 5 U.S.C. 652(a). This policy remained in effect at the time of the enactment of the Veterans' Preference Act, and has continued down to the present.

Section 14 of the Veterans' Preference Act, to be sure, conferred on veterans certain "special preferences." S. Rep. No. 907, 78th Cong., 2d Sess., p. 3. These rights were carefully and meticulously added to the Lloyd-LaFollette Act through language similar to, but slightly broader than, Section 6 of the latter Act. While the Lloyd-LaFollette Act provides merely for "notice" of the proposed removal, the Veterans' Preference Act provides for "at least thirty days advance written notice." 5 U.S.C. 652(a), 863. Similarly, the Lloyd-LaFollette Act gives the employee "a reasonable time for filing a written answer to such charges, with affidavits," while the Veterans' Preference Act gives the employee "a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer." Thus, the veterans' preference eligible is granted the additional right to answer the charges in person before the appropriate administrative officer.

The right to appeal any adverse decision to the Civil Service Commission was an additional "special preference" granted to those covered by the Veterans'

Preference Act. This was accomplished by adding to the language paralleling the Lloyd-LaFollette Act the provision granting the employee the right to appeal and the following relevant clauses concerning the appellate proceedings (5 U.S.C. 863):

> That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, * * *.

The only specific right granted the employee is the right "to make a personal appearance, or an appearance through a designated representative," and even such appearance must be "in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission." Although the Act grants the right to be heard, it does not in any way imply that the employee has a right to an adversary trial-type hearing, or to confrontation and cross-examination of the witnesses on whose written statements the removing agency relies.

Indeed, the very language used by Congress shows that it did not require or contemplate a trial-type hearing. The Act granted the employee only the right to make an appearance, not the right to a hearing. The Act conferred no subpoena power on the

Commission (see 5 C.F.R. 22.307), which would have been necessary if Congress contemplated a trial-type hearing, with the removing agency required to offer testimony. Equally persuasive is the Congressional direction that the Commission make an "investigation." The assembling of evidence by the tribunal through an independent investigation is not, of course, compatible with a traditional adversary proceeding.

That Congress did not contemplate or require such a proceeding is conclusively confirmed by its action two years after the adoption of the Veterans' Preference Act. In 1946 Congress passed the Administrative Procedure Act which specifically exempted from its requirements concerning a trial-type hearing matters pertaining to the selection or tenure of federal employees. Secs. 5 and 7, 5 U.S.C. 1004, 1006. This exception was made because "control of public personnel has been traditionally regarded as a discretionary function." S. Rep. No. 752, 79th Cong., 1st Sess., p. 16.[15]

Even if the Veterans' Preference Act could be read to require a trial-type hearing, petitioner would still not be entitled to prevail. The Act gives the employee "the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer." 5 U.S.C. 863; *infra*, p. 43; see also 5 C.F.R. 22.301,

[15] Consistent with the view that the statute does not contemplate a trial-type hearing, the courts have also regularly ruled that, so long as the prescribed procedure is followed, the Commission's decision on the merits is not reviewable. See, *e.g.*, *Keim* v. *United States*, 177 U.S. 290; *Eberlein* v. *United States*, 257 U.S. 82; *Green* v. *Boughman*, 243 F. 2d 610, 611, certiorari denied, 355 U.S. 819, and cases cited.

infra, p. 46. This means that the Veterans' Preference Act, like the Lloyd-LaFollette Act, leaves the decision as to the removal of any employee initially and primarily to the responsible administrative officer in the employing agency. 5 U.S.C. 863, 652(a), *infra*, pp. 43–45. Since the proceeding before the Commission is an "appeal" from an administrative decision, the burden of showing the incorrectness of that decision would naturally be placed upon the person taking the appeal.[16]

This principle, which applies equally to trial-type proceedings, is well established in our law. It has been frequently held that once an administrative agency has made a decision and taken action, its action is presumptively correct, and the person adversely affected has the burden of proof, both as to introducing testimony and other evidence, and as to the burden of persuasion, even in adversary *de novo* proceedings. See, *e.g.*, *Cohen* v. *Secretary*, 7

[16] The regulations place the burden of prosecuting the appeal on the employee: "An appeal will be closed for failure to prosecute, when the appellant does not furnish required information and duly proceed with the advancement of his appeal." 5 C.F.R. 22.305, *infra*, p. 46.

The procedure prescribed for appeals under the Veterans' Preference Act is quite different from that provided for the removal of Army officers. See *Beard* v. *Stahr*, 370 U.S. 41, 43, (dissenting opinion). In the Army proceeding, the burden is on the officer at the initial proceeding to show cause why he should be retained. Under the Veterans' Preference Act and the regulations, however, the responsible administrative officer removes the employee only if a preponderance of the evidence warrants such removal. The burden shifts to the employee only after the decision of the administrative officer against him, and is, insofar as this case is concerned, only a burden of producing witnesses.

T.C. 1002; *Golbert* v. *Renegotiation Board*, 254 F. 2d 416, 417 (C.A. 2); *Pittsburgh S.S. Co.* v. *Brown*, 171 F. 2d 175–179 (C.A. 7); *Baltensperger* v. *United States*, 174 F. Supp. 601 (D. Neb.). Similarly, Section 7 of the Administrative Procedure Act provides, as to trial-type proceedings, that "the proponent of a rule or order shall have the burden of proof." 5 U.S.C. 1006(*c*). Therefore, even were we to assume *arguendo* that the Veterans' Preference Act contemplated a full trial-type proceeding before the Commission, it would have been entirely consistent with this requirement to place the burden of proof on the employee. Here, the government's argument is much more limited. The Commission's regulations do not place the burden of proof on the employee; they merely require him to go forward by arranging for his own witnesses, whether they are the witnesses on whose written statements the removing agency relies or others.

2. The legislative history of the Veterans' Preference Act confirms the Congressional purpose, apparent from the language of the Act itself, to grant an appeal to the Civil Service Commission with only one specific procedural right on that appeal, namely to make "a personal appearance, or an appearance through a designated respresentative." Thus, the Senate report described the rights conferred in regard to the appeal to the Civil Service Commission as follows (S. Rep. No. 907, 78th Cong., 2d Sess., p. 3)

> This section also confers upon preference eligibles the right to appeal to the Civil Service Commission from adverse decisions of admin-

> istrative officers, and to make a personal appearance or an appearance through a designated representative in accordance with rules and regulations to be issued by the Civil Service Commission.

The House report contained similar language. H. Rep. No. 1289, 78th Cong., 2d Sess., p. 4. Congressman Starnes, the author of the bill (90 Cong. Rec. 3502), described the appeal provisions in much the same language in explaining it on the floor of the House. 90 Cong. Rec. 3503. Nowhere in the committee reports, or in statements on the floor, did any member of the Congress state or suggest that the bill conferred any procedural rights on the administrative appeal other than those specified. 90 Cong. Rec. 3501-3505.

Full hearings were held before the Senate Civil Service Committee prior to the enactment of the Veterans' Preference Act. Hearings before the Senate Committee on Civil Service on S. 1752 and H.R. 4115, 78th Cong., 2d Sess. The transcript of th hearing likewise fails to support petitioner's position. Not once during the entire hearing was there any suggestion that the Act was designed to confer on veterans the right to a trial-type hearing, with compulsory confrontation of witnesses and the like.

Petitioner, apparently acknowledging that none of the legislative materials in the 78th Congress which enacted the Veterans' Preference Act are of any help to his position, relies (Pet. Br. 8) on a statement made by a witness for the Veterans of Foreign Wars in hearings before a House Committee of the 75th Congress in 1937, some seven years and three Con-

gresses before the Act's adoption. The witness stated that the bill then before the Committee was intended to provide an employee who has been removed "a proper hearing" and "an opportunity to defend himself by trial." Reliance on such evidence of legislative intent requires little refutation. This Court ruled in *Rainwater* v. *United States*, 356 U.S. 590, 593, that one 'ongress' construction of a much earlier Congress' intent is ordinarily entitled to little weight. Statements by a witness to a committee of a far earlier Congress deserve even less consideration. At any rate, the quotation relied upon by petitioner does not assist him because the witness used the terms "hearing" and "trial" to mean "opportunity to be heard." See Hearings before the House Committee on Civil Service on H.R. 5558, 5821, and 6497, 75th Cong., 1st Sess., pp. 118, 122. And in stating in effect that the employee would have a right to be heard and to defend himself, the witness was merely restating the employee's right to make a personal appearance. That right was specifically included in Section 14 of the Veterans' Preference Act and was of course afforded to petitioner here. At no point in the 1937 hearings did that witness, or any other witness, state or imply that the proposed bill would require the employing agency to arrange for the appearance of the witnesses whom the employee wished to have testify.

If Congress had proposed to depart from its long-established policy of not providing for trial-type hearings on removals from government service, it certainly would have manifested that intent in the Act itself, or at least in the committee reports and

in statements on the floor. The absence of any suggestion in the legislative materials is a convincing demonstration that Congress did not intend to confer any such right.

Legislative events following the 1944 adoption of the Veterans' Preference Act confirm our view. As we have seen (pp. 32–33), in 1946 Congress adopted the Administrative Procedure Act, specifically excepting personnel cases from that Act's general requirements of a trial-type hearing. In 1947 the Veterans' Preference Act itself was amended to enlarge the authority of the Civil Service Commission by making its decisions on employee appeals binding upon the employing agency.[17] By this date the Civil Service Commission had adopted its regulations clearly stating its practice of requiring the employee to arrange for the appearance of all witnesses desired by him. See § 22.9(f), 9 Fed. Reg. 13189, 13191. Congress implicitly accepted and ratified that interpretation by reenacting precisely the same language as that previously used, *i.e.*, the provision giving the employee only the right to make a personal appearance, or to have a representative, on his appeal to the Commission. Act of Aug. 4, 1947, c. 447, 61 Stat. 723. See *Tequhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 293, and the cases cited therein; *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 409. The committee reports and discussion on the floor again make

[17] Prior to that time, the Commission could only recommend corrective action by the agency. 58 Stat. 390, 391; see also Hearings before the Senate Committee on Civil Service on S. 1752 and H.R. 4115, 78th Cong., 2d Sess., p. 30.

it clear that no more was intended. S. Rep. No. 631, 80th Cong., 1st Sess., p. 4; 93 Cong. Rec. 7319.

3. The Commission's interpretation of the Veterans' Preference Act is entitled to particularly great weight. The chief proponent of the Act—the man who explained its provisions and meaning to the members of the Senate Committee which reported it—was Arthur S. Flemming, who was then a Civil Service Commissioner. Hearings before the Senate Committee on Civil Service on S. 1752 and H.R. 4115, 78th Cong., 2d Sess., pp. 10–32. While the contemporaneous interpretation of a statute by those who are charged with administering it is always of substantial importance, we think that such construction should be given even greater deference where the bill is sponsored, supported, and explained by the agency which is to be charged with its administration.

Norwegian Nitrogen Co. v. *United States*, 288 U.S. 294, to which we have referred earlier, strikingly resembles the case at bar. That case involved proceedings before the Tariff Commission, which Congress had denominated "hearings." Congress had also provided that importers and other interested parties should be given "reasonable opportunity to parties interested to be present, to produce evidence, and to be heard." *Id.* at 303. The Tariff Commission, like the Civil Service Commission, was authorized to make investigations. The subject in controversy, tariff rates, like the matter here, was not in an area of rights traditionally protected by the Constitution, but was one in which the individuals affected had an important and direct financial interest. The importer there involved asserted the right to examine the evidence, to be heard on all evidence collected by the

Tariff Commission in its investigation, and to cross-examine the Commission's experts and informants with reference to the information they collected. *Id.* at 301, 303. And, just as the employee here is demanding the right to cross-examine others without having subjected himself to cross-examination, the importer in *Norwegian Nitrogen* sought to obtain cost information of its competitors without disclosing that information about the foreign company whose goods it imported. *Id.* at 300. This Court, after noting that the term "hearing" may have different meanings in different contexts, relied on the Tariff Commission's interpretation of the statute and ruled that the Act did not grant the importer the rights he claimed. Cf., *United States* v. *Nugent*, 346 U.S. 1.

The argument for upholding the Civil Service Commission's interpretation of the Veterans' Preference Act is in many ways stronger than that for upholding the interpretation of the Tariff Commission which was accepted by this Court in *Norwegian Nitrogen*. In this case there was full disclosure to the employee of all the evidence which the Civil Service Commission had before it, and full opportunity to offer any conflicting testimony or evidence to rebut or contradict it. Moreover, in this case the regulations provided a method for cross-examining those who had given adverse information if the employee merely arranged for their appearance. Thus, petitioner could have confronted and cross-examined the hostile witnesses, if he had arranged for their appearance. Finally, he is in no position to deny that such arrangements could have been made.

4. Both courts which have considered the Veterans' Preference Act have upheld the Civil Service Com-

mission's interpretation of it, as well as the Commission's regulations (see *supra*, pp. 23-26), by rejecting the contentions made by petitioner here. *Devine* v. *Campbell*, 194 F. 2d 876 (C.A. D.C.); certiorari denied, 344 U.S. 826; *Green* v. *Baughman*, 243 F. 2d 610, 613 (C.A. D.C.), certiorari denied, 355 U.S. 819; *Atkinson* v. *United States*, 144 C. Cls. 585, 598-601; *Horn* v. *United States*, 177 F. Supp. 438, 439-440 (C. Cls.).

Thus, in *Devine* v. *Campbell* the Court of Appeals for the District of Columbia Circuit held that the Veterans' Preference Act did not require or contemplate a trial-type hearing with the compulsory appearance of witnesses, and that the regulations imposing the burden of producing witnesses upon the party desiring their presence were authorized by the Act. 194 F. 2d at 880. In doing so, it relied upon the absence of subpoena power in the Commission, the basic policy set forth by Congress in the Lloyd-LaFollette Act, and the express exception from the hearing requirements of the Administrative Procedure Act.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

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[See page 38 for footnote 17.]

Appendix A

1. Section 14 of the Veterans' Preference Act, 58 Stat. 390, as amended, 5 U.S.C. 863, provides as follows:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt

of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendationss to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further*, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title.

2. Section 15 of the Veterans' Preference Act, 58 Stat. 39, as amended, 5 U.S.C. 864, provides:

Any preference eligible, who has been furloughed, or separated without delinquency or misconduct, upon request, shall have his name placed on all appropriate civil-service registers and or on all employment lists, for every position for which his qualifications have been established, as maintained by the Civil Service Commission, or as shall be maintained by any agency or project of the Federal Government, or of the District of Columbia, in the order as provided in section 856 of this title, and shall then be eligible for recertification and reappointment in the order and according to the procedure as provided for in sections 856 and 857 of this title. No appointment shall be made from an examination register of eligibles, ex-

cept of ten-point preference eligibles, when there are three or more names of preference eligibles on any appropriate reemployment list for the position to be filled.

3. Section 6(a) of the Lloyd-LaFollette Act, 37 Stat. 555, as amended, 5 U.S.C. 652(a) provides:

> No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. This subsection shall apply to a person within the purview of section 863 of this title, only if he so elects.

4. The Civil Service Commission Regulations, entitled "Appeals of Preference Eligibles under the Vet-

erans' Preference Act of 1944," provide in pertinent part:

§ 22.301. RIGHT OF APPEAL.

An employee may appeal to the Commission from any decision of an administrative officer to take adverse action.

* * * * * *

§ 22.305. FAILURE TO PROSECUTE APPEAL.

An appeal will be closed for failure to prosecute, when the appellant does not furnish required information and duly proceed with the advancement of his appeal. In lieu of closing for failure to prosecute, an appeal may be adjudicated if the information is sufficient for that purpose. A closed appeal will not be reopened except in the discretion of the Commission upon a showing that circumstances beyond the control of the appellant prevented him from prosecuting the appeal.

* * * * * *

SUBPART D—COMMISSION ACT ON INITIAL APPEAL.

§ 22.401. INVESTIGATION.

(a) *Scope.*—Investigation will be made by the Commission to develop the facts and circumstances relative to the adverse decision.

(b) *Evidence.*—Statements of the witnesses shall be by affidavit, when practicable, and relative to the adverse decision.

(c) *Evidence available to both parties.*—All relevant representations shall be discussed with both parties to the appeal and shall be available for review by them, with the following exceptions: Where adverse action has been taken on the basis of the reported mental condition of the individual concerned or other condition of such a nature that a prudent physician would hesitate to inform a person suffering from such a condition as to its exact nature and probable outcome, the medical evidence of record will be made available only to a duly licensed physician

designated in writing by the appellant or by appellant's representative.

§ 22.402. RIGHT TO A HEARING.

The employee shall have a right to a hearing before the office of the Commission undertaking initial adjudication of his case. This shall be the only opportunity for hearing as a matter of right. The employee shall be advised of his right to a hearing and shall express his desire in writing.

* * * * *

§ 22.404. RECOMMENDED CORRECTIVE ACTION.

The Chief, Appeals Examining Office, or the regional director shall recommend such corrective action as may be necessary.

* * * * *

§ 22.406. AGENCY ACTION.

It is mandatory for the agency to take corrective action in accordance with the decision made by the Chief, Appeals Examining Office or the regional director, unless appeal is made to the Board of Appeals and Review.

* * * * *

§ 22.501(a). APPEALS TO THE BOARD OF APPEALS AND REVIEW.

Appeal from decision of a Commission office. When an employee or the employing agency elects to appeal from a decision of the Chief, Appeals Examining Office, or regional director, such appeal shall be made to the Board of Appeals and Review (hereinafter referred to as the "Board"), U.S. Civil Service Commission, Washington 25, D.C.

* * * * *

§ 22.503. FINALITY OF DECISION.

The decision on an appeal to the Board shall be final. There is no further right to appeal. A recommendation for corrective action is mandatory and must be complied with by the

agency. Where corrective action is required, the agency shall report to the Board promptly that such action has been taken.

* * * * *

SUBPART F—HEARINGS

§ 22.601. RIGHT TO APPEAR AT HEARING.

An employee has a right to appear at the hearing on his appeal, personally or through or accompanied by his representative, before the office of the Commission handling the appeal. The agency has a right to participate in such a hearing. Both parties shall have the right to produce witnesses.

§ 22.602. HOW CONDUCTED.

The hearing will be informal and will be conducted by a representative of the Commission.

§ 22.603. INTRODUCTION OF EVIDENCE.

Opportunity will be afforded for the introduction of evidence (including testimony and statements by the employee and his designated representative and witnesses and by representatives of the agency and its witnesses) and for the cross-examination of witnesses.

§ 22.604. RULES OF EVIDENCE.

Rules of evidence will not be strictly applied during hearings, but the Commission representative in charge of the hearing shall use reasonable discretion to exclude irrelevant or unduly repetitious testimony.

§ 22.605. TESTIMONY TAKEN UNDER OATH; RECORD OF HEARINGS.

The testimony at hearings shall be under oath. The office of the Commission handling the appeal shall determine how the hearing will be recorded. If the hearing is recorded verbatim, the reporter's transcript shall be made a part of the record of the proceeding and a copy shall be furnished to each

party. When the hearing is not recorded verbatim, the presiding officer shall make a suitable summary of pertinent portions of the testimony. When agreed to in writing by all parties concerned, the summary shall constitute the report of the hearing and shall be made a part of the record. A copy shall be furnished to each party. Should the presiding officer and the parties fail to agree on the summary, the parties shall be permitted to submit, in writing, exceptions to any part of the summary. Such exceptions shall be considered in connection with the making of the finding and recommendation.

§ 22.606. LIMITATION ON ATTENDANCE AT HEARINGS.

Hearings shall not be open to the general public or press. Attendance shall be limited to persons determined by the Commission to have a direct connection with the appeal.

§ 22.607. APPEARANCE OF WITNESSES.

The Commission is not authorized to subpoena witnesses. The employee and his designated representative, and the employing agency, must make their own arrangements for the appearance of witnesses.

APPENDIX B

U.S. CIVIL SERVICE COMMISSION,
Washington 25, D.C., October 30, 1962.

Hon. JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General,
Civil Division,
Department of Justice,
Washington, D.C.

Attention David L. Rose, Esq.

Re: *Williams* v. *Zuckert*, et al., Supreme Court No. 133.

DEAR MR. GUILFOYLE: Mr. Rose of your office has requested that the Commission inform him of its administrative practice in reference to the right of an employee, in a veteran's preference appeal to the Commission of an adverse action, to have adverse witnesses produced by the agency for the purpose of cross-examination.

Section 14 of the Veterans Preference Act of 1944, as amended, 5 U.S.C. § 863, provides that the veteran has a right to appeal to the Civil Service Commission, and "shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission. * * *"

On November 7, 1944 the Commission issued Part 22 of its regulations to govern appeals under the Veterans Preference Act. 9 F.R. 13189. These regulations provided as follows:

> § 22.9 HEARINGS—(a) Right to appear personally or by representative. The appellant shall have the right to appear personally or

through or accompanied by a designated representative in connection with his appeal and if an appellant has expressed the desire for such a personal appearance arrangements will be made for a hearing following the investigation.

(b) Notice of hearings and where scheduled. (1) * * * (the Commission's notice shall inform) both parties of a right to produce evidence and witnesses. * * *

(c) How conducted. * * * an opportunity (will be) afforded for the introduction of evidence, including testimony and statements by the appellant and his designated representative and witnesses and representatives of the employing agency and witnesses, and for the cross-examination of witnesses.

* * * * *

(f) Appearance of witnesses. The Commission does not have the power of subpoena and appellants and their designated representatives, and employing agencies, will be required to make their own arrangements for the appearance of witnesses.

We are unaware of any right on the part of anyone to a "hearing" on appeal to the Commission prior to the issuance of these regulations. Neither the Lloyd-La Follette Act, 5 U.S.C. 652, nor the Commission's regulations issued thereunder, Part 9 of Title 5, CFR, provides for such a hearing.

It has been the consistent interpretation of the Civil Service Commission since enactment of the Veterans Preference Act of 1944 that the statute and regulations do not require the agency to produce witnesses whose presence is desired by the employee for the purpose of confrontation and cross-examination.

Sincerely yours,

/s/ Philip J. La Macchia,

PHILIP J. LA MACCHIA,
Chief, Hatch Act and Litigation Section,
Office of the General Counsel.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 133

DANIEL ALTON WILLIAMS,

Petitioner,

vs.

EUGENE M. ZUCKERT,
Secretary of the Air Force, *et al.*,

Respondents.

N WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

DAVID I. SHAPIRO
Attorney for Petitioner
1411 K Street, N. W.
Washington 5, D. C.

IDNEY DICKSTEIN
of Counsel

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 133

DANIEL ALTON WILLIAMS,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

I.

Respondents urge that no constitutional issue is raised or presented and that petitioner, who asserted a violation of his Fifth Amendment rights before the Civil Service Commission and in the district court, abandoned that argument in the court of appeals and in this Court (Res. Br., 15-16). This contention is misleading. While it is true that the constitutional issue is not asserted as an independent ground for reversal, we pointed out in the court of appeals[1]

[1] Appellant's Br., p. 2, C.A.D.C., Appeal No. 16,345.

and in this Court[2] that jurisdiction in the district court was based, *inter alia*, on the "Fifth and Sixth Amendments to the Constitution of the United States," and urged the constitutional issue as an aid to statutory construction in our briefs in the courts below.[3]

The construction respondents place on Section 14 of the Veterans Preference Act and the applicable Civil Service Regulations (Res. Br., 18-21, 29-33) raises serious doubts as to their constitutional validity. In *Bailey* v. *Richardson*, 341 U.S. 918 (1951), this Court upheld the denial of confrontation and cross-examination to a non-veteran dismissed from federal employment on loyalty grounds by an evenly divided vote. The constitutional problem inherent in a denial of confrontation and cross-examination to one dismissed from federal employment is hardly less substantial when the ground for dismissal is homosexual conduct. We urge, therefore, that the Court construe the statute and applicable regulations, "if fairly possible, in such a way as to free [them] from [these] not insubstantial constitutional doubts." *Lynch* v. *Overholser*, 369 U.S. 705, 711 (1962); *United States* v. *Rumely*, 345 U.S. 41, 45-47 (1953); *United States* v. *Jin Fuey May*, 241 U.S. 394, 401 (1916).

Rejection of respondents' construction of the statute and applicable regulations is dictated, moreover, by *Greene* v. *McElroy*, 360 U.S. 474 (1959). In that case, this Court considered the importance of confrontation and cross-examination in our jurisprudence and pointed to the "zealous protection" accorded these rights by the Constitution, the Courts and the Congress. *Id.*, at pp. 496-497. It adverted

[2] Pet., 5; Pet. Br., 4.

[3] Appellant's Br., pp. 12, 14-15; Reply Br., pp. 3-4, C.A.D.C., Appeal No. 16,345.

to the classic statement of Professor Wigmore that "no safeguard for testing the value of human statements is comparable to that furnished by cross-examination" (*id.*, at pp. 497-498), and concluded that, in the absence of explicit authorization from either the President or the Congress, "respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Id.*, at pp. 507-508. Here, as distinguished from Section 6 of the Lloyd-LaFollette Act, 37 Stat. 555, 5 U.S.C. §652, there is no explicit congressional rejection of the right of confrontation and cross-examination. In fact, Congress eliminated from Section 14 of the Veterans Preference Act, 58 Stat. 390, 5 U.S.C. §863, the Lloyd-LaFollette provision making cross-examination of witnesses, trial, or a hearing a matter for the discretion of the removing officer, and substituted therefor, an appeal to the Civil Service Commission with the right to make an appearance either personally or by representative. (See Pet. Br., 7-9.) And where explicit rejection of the right of confrontation and cross-examination is absent, this Court will not assume that Congress intended to deny these safeguards to the individuals affected. *Greene* v. *McElroy*, 360 U.S., at 507-508; *Bland* v. *Connally*, 293 F.2d 852, 857-860 (C.A.D.C., 1961); *Davis* v. *Stahr*, 293 F.2d 860, 863-864 (C.A.D.C., 1961).

Respondents seek to avoid the impact of the Air Force's refusal to produce at the hearing the adverse witnesses against petitioner by suggesting that they might have appeared if petitioner had only asked them (Res. Br. 14-15, 28). This argument ignores Air Force Regulation No. 110-5,[4] the military status of the accusing witnesses, and

[4] AFR No. 110-5, 32 C.F.R. §804.404(a) provides: "Where the United States is a party to the litigation in question, no information will be released without the concurrence of the Judge Advocate General, U.S.A.F. * * * or one of [his] representatives.

the fact that two of the witnesses were stationed at the Air Force Academy and petitioner had been barred from entering the Academy grounds (R. 18-19). Neither the Air Force nor the Civil Service Commission suggested during the administrative proceedings that petitioner could secure the appearance of these witnesses merely by asking them to attend. When petitioner officially requested that the Air Force produce them, his request was rejected because "the Air Force Academy saw no need for their attendance" (R. 44) and AFR No. 110-5, 32 C.F.R. §804.401, *et seq.*, precluded their voluntary appearance absent consent from the Air Force.

II.

Respondents to the contrary notwithstanding (Res. Br. 22-23), the contemporaneous administrative construction of the appeal provision of Section 14 of the Veterans Preference Act is evidenced by the Commission's regulations promulgated thereunder (Pet. Br. 8-9), not by an erroneous administrative practice departing therefrom. If the practice and not the regulation is to be accepted as guiding or controlling judicial decision, it must at least be known. Cf. *Sanford's Estate* v. *CIR*, 308 U.S. 39, 50, 52 (1939); *Baltimore & Ohio R. Co.* v. *Jackson*, 353 U.S. 325, 330-331 (1957). Respondents' argument concerning the 1947 reenactment of the Veterans Preference Act (Res. Br. 38-39) expressly confirms this view. By that time, the Civil Service Commission had adopted regulations providing for an

---

i.e., a staff judge advocate * * *". The regulation defines "litigation" as including "civil administrative proceedings [before] commissions, boards, or other tribunals" (32 C.F.R. §804.41) and requests for appearance not accompanied by a valid subpoena are treated as "a request for release of information." 32 C.F.R. §804.411(c).

adversary type of administrative hearing at the appeal level (Pet. Br. 8),[5] and it was the statute as interpreted by these regulations, not the unreported administrative practice thereunder, which Congress in 1947 "implicitly accepted and ratified" (Res. Br. 38). Cf. *Cammarano* v. *United States*, 358 U.S. 498, 511 (1959).[6]

The fact that the Veterans Preference Act confers no subpoena power on the Commission (Res. Br. 32-33) is hardly persuasive where the Air Force admitted that the witnesses to petitioner's alleged misconduct were airmen on active duty, subject to its military control, and the only reason it refused to produce them was because it unilaterally concluded that their testimony would not have aided petitioner's case (R. 85). In *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), the Department of Interior had no power to subpoena witnesses. Yet, this Court construed Section 21(c)(4) of Interior Department Order No. 2738 (which gave the employee the right to "cross-examine any witness offered in support of the charges"), as requiring the Interior Department to call as witnesses all "non-confidential informants" who furnished information against the employee upon which the agency relied.

---

[5] These regulations, which are substantially the same now as when first issued, provide that the "employee has a right to appear at the hearing on his appeal * * *", that the "agency has a right to participate in such a hearing", and that "[b]oth parties shall have the right to produce witnesses" (5 C.F.R. §22.601); that "[o]pportunity will be afforded for the introduction of evidence (including testimony and statements by the employee * * * and witnesses and by representatives of the agency and its witnesses) and for the cross-examination of witnesses" (5 C.F.R. §22.603); and that "testimony at hearings shall be under oath" (5 C.F.R. §22.605).

[6] The Civil Service Commission's interpretation of the applicable regulations first became a matter of public knowledge in 1951 when *Devine* v. *Campbell*, 194 F.2d 876 (C.A.D.C.) certiorari denied, 344 U.S. 826 (1952), was decided.

Moreover, while we agree that the applicable regulations provide broadly for a Commission investigation (Res. Br. 5-6, 19), it should be noted that the statute requires both that the Commission shall investigate and that the employee "shall have the right to make a personal appearance * * * ." 58 Stat. 390, 5 U.S.C. §863. The regulation providing that "[s]tatements of the witnesses shall be by affidavits, when practicable * * * ," 5 C.F.R. §22.401(b), relates to the investigation of employee's appeal by the Commission and not, as respondents contend (Res. Br. 18-19), to the introduction of evidence at the appeal hearing itself. See 5 C.F.R. §22.603. It should also be noted that while a veteran's appeal proceeding before the Commission is denominated as an "appeal", it is normally the first opportunity the employee has for a "hearing" on the charges against him. In this respect, the "appeal" hearing before the Commission is substantially similar to a hearing before an Appeal Division of a regional Industrial Personnel Security Board. See *Greene* v. *McElroy*, 360 U.S. 474, 485-490 (1959).

In *Vitarelli* v. *Seaton*, 359 U.S. 535, 544-545 (1959), this Court construed a regulation substantially similar to 5 C.F.R. §22.603 as requiring the Interior Department to call as witnesses all "non-confidential" informants. Respondents advance no persuasive reason (Res. Br. 25-27) why *Vitarelli* is not controlling here.

Conclusion

By reason of the foregoing, the decision below should be reversed.

Respectfuly submitted,

David I. Shapiro
Attorney for Petitioner
1411 K Street, N. W.
Washington 5, D. C.

Sidney Dickstein
of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 133

DANIEL ALTON WILLIAMS, *Petitioner*,

v.

EUGENE M. ZUCKERT, Secretary of the Air Force, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

DAVID I. SHAPIRO
1411 K Street, N. W.
Washington 5, D. C.
Attorney for Petitioner

SIDNEY DICKSTEIN,
Of Counsel

IN THE

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DANIEL ALTON WILLIAMS, *Petitioner*,

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR REHEARING

After the close of oral argument of this cause, the Solicitor General advised the Court by letter, *inter alia*,:

> "3. The Air Force raised no impediments in the present case. Petitioner did not attempt to communicate with the witnesses or request the Air Force to produce them prior to the hearing.
>
> "4. The Air Force regulations and statements of policy give me every reason to believe it would have required the three men in question to appear if the petitioner had requested it to do so."

This Court concluded, in the absence of clear contradiction in the record, that:

> "Although amply notified in advance of the nature of the charges, the names of the witnesses whose affidavits had supplied the factual basis for his dismissal, and the date of the hearing, neither petitioner nor his counsel made any request, prior to the hearing, of the Air Force, of the Commission or its examiners, or of the witnesses themselves, for their appearance for cross-examination. The request for production of the witnesses, made only at the hearing by petitioner's counsel, was neither timely nor in conformity with the applicable regulations, which contemplate that the party desiring the presence of witnesses, either for direct or cross-examination, shall assume the initial burden of producing them."

Information brought to the attention of petitioner's counsel after the Court handed down its opinion, clearly shows that the post-argument representations of the Solicitor General were in error.

On April 28, 1959, seven days before the date of the hearing, petitioner gave an affidavit to Robert M. Sefranka, Investigator, U. S. Civil Service Commission. Petitioner's counsel has been advised by Stephen Pollak, Esq., of the Solicitor General's office that the file jacket of the Civil Service Commission contains the original of that affidavit, a copy of which is annexed as Exhibit A. In that affidavit, petitioner stated:

> "I further request that the good faith of the employing agency be demonstrated by presenting SSGt Alton Tyler at the hearing before the Hearings (sic) Examiner for cross-examination on May 5, 1959 at 9:00 A.M. since the said Tyler is under the jurisdiction of the employing agency and subject to its commands as a military person,

> which power to require his attendance (sic) is not available to me by subpoena or available to the Commission.
>
> * * *
>
> "It is further requested that A 2C Patrick J. Ryan and A 2C Curtis L. Stevens also be present at the hearing scheduled May 5, 1959 at 9:00 A.M. on the same grounds as herein asserted for the presence of SSgt Alton Tyler."

The foregoing information was communicated to the Office of the Solicitor General who advised by letter dated January 29, 1963:

> "There is no inconsistency between the affidavit and the fourth point set forth in my letter of December 13, 1962. The only request for the appearance of witnesses was in the affidavit which was filed with an investigator of the Civil Service Commission. It does not appear that prior to the hearing Mr. Williams ever made any request direct to the Air Force."

On January 31, 1963, petitioner's counsel telephoned Mr. Sefranka, the Commission Investigator who subscribed the affidavit of April 28, 1959. Mr. Sefranka is still employed in that capacity and assigned to the Commission's office in Albuquerque, New Mexico. Mr. Sefranka stated that he had had no contact with the matter for a period of approximately five years, but did recall making the investigation. He further stated that it was standard operating procedure to show such affidavits to the employing agency *prior* to the hearing in order to elicit any further comment the agency might desire to make. He added that this was the specific reason for the standard language at the end of such statements, *i.e.*, "The information given is not to be considered confidential."

Neither petitioner nor his counsel could reasonably anticipate that the timeliness of the demand would be material to a resolution of this cause. Inasmuch as the district court dismissed the complaint on respondents' motion for summary judgment without inquiry into those facts which this Court's opinion makes material, and the court below affirmed (R. 100) relying upon its prior, and now erroneous, decision in *Devine* v. *Campbell*, 194 F. 2d 876, certiorari denied, 344 U.S. 826, petitioner should be accorded an opportunity to demonstrate that he "[brought] himself within" the regulations as construed by this Court.

CONCLUSION

By reason of the foregoing, the petition for rehearing should be granted, the judgment below should be reversed and the case remanded for a full hearing consistent with the opinion of this Court.

Respectfully submitted,

DAVID I. SHAPIRO
1411 K Street, N. W.
Washington 5, D. C.

Attorney for Petitioner

SIDNEY DICKSTEIN,
Of Counsel

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay.

DAVID I. SHAPIRO

EXHIBIT A

AFFIDAVIT

State of Colorado
City and County of Denver } ss

I, Daniel Alton Williams, residing at 1830 E. 39th. Avenue, Denver, Colorado, being duly sworn, make this statement of my own free will, without promises or assurances:

That in addition to my affidavit dated April 23, 1959, this affidavit is hereby submitted as a supplement thereto, and that I do hereby object and except to any consideration by the Commission of that portion of the letter of charges dated 11 March 1959, and specifically to the alleged offenses dated 30 March 1957 and 10 May 1958 in that the said charges relate to alleged offenses that allegedly occurred prior to the date of my certification and employment as a civilian employee of the United States Air Force Academy, which date of employment was 13 October 1958, and on the further grounds that the aforesaid charges were while I was in the United States Air Force fully investigated by the Office of Special Investigation. That pursuant to said investigation the evidence was found to be insufficient to warrant a courts martial and subsequent thereto I was honorably discharged from the United States Air Force. That the foregoing allegations were fully known to the employing agency and more specifically by my immediate superiors, i.e. Captain Robert E. Reenz and Colonel Evan F. Bourne and the Chief of Staff of the Air Force Academy. That in reference to the allegations in relation to and made by SSGT Alton Tyler the affidavit submitted by him is totally irrelevant and prejudicial in that the alleged report made by said affiant was hearsay to me, contains numerous contradictions of fact and does not relate to misconduct while a civilian employee. I further request that the good faith of the employing agency be demonstrated by presenting SSGT Alton Tyler at the hearing before the Hearings Examiner for cross-examination on May 5, 1959 at 9:00

A.M. since the said Tyler is under the jurisdiction of the employing agency and subject to its commands as a military person, which power to require his attendant is not available to me by subpoena or available to the commission.

That in reference to the allegation of wilful damage to a Government typewriter no evidence has been submitted to me by affidavit or otherwise as to the fact of damage and said allegation should be dismissed and not considered for any purpose by the Commission since there was apparently no such proof available to the employing agency when it reached a determination of damage in the absence of proof and the said agency should now be precluded from attempting to buttress a decision which in the first instance was without proof now being permitted to provide the absent evidence.

It is further requested that A/2c Patrick J. Ryan and A/2c Curtis L. Stevens also be present at the hearing scheduled May 5, 1959 at 9:00 A.M. on the same grounds as herein asserted for the presence of SSGT Alton Tyler.

That it is my desire and request that I be permitted to offer such additional or new evidence that may become available to me prior to the date of the hearing at the hearing of May 5, 1959.

It is further alleged that during the course of my employment I was denied the simple courtesies from my supervisor, Mrs. Jeanne W. DeSmet, who refused to occupy the same office with me, who informed me that my effectiveness in the Colorado Springs area was adversely affected by reason of my race and color. That resentment was manifested by her to the fact that I was even employed in the position from which I have been removed.

I do hereby incorporate by reference the following affidavits and request that the same be made a part of the record on appeal, to-wit:

Affidavit of Joseph G. DeSantis, dated 12 March 1959.
" " Mildred L. Culleton
" " Cadet James R. Blackwell

and a carbon copy of a letter addressed to Captain Renz and Rutledge, dated 24 October 1958.

I do hereby designate Irving P. Andrews, Esq. of Denver, Colorado, as my attorney for the hearing of May 5, 1959, before the hearings examiner.

I have read the above statement consisting of 2 pages, which is true and complete to the best of my knowledge and belief. I further understand that the information I have given is not to be considered confidential and that it may be shown and discussed to the *interested* parties.

DANIEL ALTON WILLIAMS
Daniel Alton Williams

Subscribed and sworn to before me at Denver, Colorado, this 28th day of April, 1959.

ROBERT M. SEFRANKA, *Investigator*
U.S. Civil Service Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 433

DANIEL ALTON WILLIAMS, *Petitioner*,

v.

EUGENE M. ZUCKERT, Secretary of the Air Force, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

SUPPLEMENT TO PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 133

DANIEL ALTON WILLIAMS, *Petitioner*,

v.

EUGENE M. ZUCKERT, Secretary of the Air Force, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENT TO PETITION FOR REHEARING

On February 15 and 16, 1963 petitioner's counsel received the affidavits annexed hereto as Exhibits B and C.

Exhibit B is an affidavit from Irving P. Andrews, Esq., the attorney who represented petitioner before the Civil Service Commission. In this affidavit, Mr. Andrews avers that the Air Force had notice of petitioner's request for the production of witnesses (Ex. A to Petition for Rehearing) and that prior to the hearing before the Appeals Examiner, Tenth Civil Service Region, Robert M. Sefranka, Investigator, U. S. Civil Service Commission, informed him "by

telephone that the demand for the production of witnesses had been rejected by Captain Roger P. Fox, Provost Marshal and spokesman for the Superintendent of the Air Force Academy * * *."

Exhibit C is an affidavit from Curtis L. Stevens, former Airman second-class, United States Air Force, and one of the three witnesses petitioner requested that the Air Force produce at the hearing before the Appeals Examiner, Tenth Civil Service Region (Petition for Rehearing, p. 6). In this affidavit, Mr. Stevens avers that he was informed by Captain Fox, Provost Marshal, Air Force Academy "that the Affidavit executed by me on April 24, 1959, would be adequate for the purposes of the hearing on May 5, 1959, and that my personal appearance there would not be necessary."

These affidavits refute the Solicitor General's post-argument representations made to this Court on December 13, 1962, and underscore the error of the summary disposition below (see Petition for Rehearing, p. 4).

CONCLUSION

By reason of the foregoing, the petition for rehearing should be granted, the judgment below should be reversed and the case remanded for a full hearing consistent with the opinion of this Court.

Respectfully submitted.

DAVID I. SHAPIRO
1411 K Street, N. W.
Washington 5, D. C.
Attorney for Petitioner

SIDNEY DICKSTEIN,
Of Counsel

EXHIBIT B

Affidavit

STATE OF COLORADO }
COUNTY OF DENVER } ss.

I, Irving P. Andrews, Attorney at Law, residing at 3451 E. 26th Avenue, Denver, Colorado, and being of lawful age, and first duly sworn upon my corporeal oath, depose and say:

That I am an attorney at law admitted to practice before the Supreme Court of the State of Colorado, and The U. S. District Court of Colorado and the 10th Court of Appeals; that in such capacity as an attorney I did represent the appellant, Daniel Alton Williams, in a hearing held before the Appeal Examiner for the 10th Civil Service Region, U. S. Civil Service Commission, on May 5, 1959, at Denver, Colorado, which hearing related to the dismissal of the appellant from his position at the United States Air Force Academy.

That affiant further states that on April 28, 1959, Mr. Robert M. Sefranka, Investigator, U. S. Civil Service Commission, was formally requested to convey, personally, the appellant's affidavit, requesting the appearance of certain witnesses named therein to appear before the Appeals Examiner, 10th Civil Service Region, to the appropriate officials of the Air Force Academy for the purpose of confrontation and cross-examination on May 5, 1959, at 9:00 o'clock A.M., at the Denver Federal Center, Denver, Colorado, at the hearing previously scheduled by the Appeals Examiner relating to the dismissal of the appellant.

That subsequent to April 28, 1959 and prior to May 5, 1959, the said Robert M. Sefranka, advised affiant by telephone that the demand for the production of witnesses had been rejected by Captain Roger P. Fox, Provost Marshal and spokesman for the Superintendent of the Air Force Academy, and Mrs. Josephine Dillon, spokesman for the Director of Civilian Personnel, Mr. James E. Dodson, had

similarly negatived the appellant's request for the production of the alleged government witnesses referred in Exhibit "A" and incorporated as an addendum to Petitioner's Petition For Rehearing.

That affiant further says that at the "hearing" of May 5, 1959, affiant at the inception of the proceedings inquiry was made of the Air Force Academy representative, Mrs. Josephine Dillon, as to the reason for the absence of the requested witnesses, and that the affiant was summarily informed by Mrs. Josephine Dillon, "that the Academy saw no need for their attendance at the hearing, and did not consider that their presence could add anything to the hearing".

That the affiant then replied, "that in other words the request which the appellant made for the appearance of Airmen Ryan, Stevens and Tyler was rejected", to which Mrs. Dillon answered affirmatively.

That at the earliest opportunity after being informed of the specific nature of the allegations directed against him and the identity of the witnesses on whom the government relied, appellant made written demand on the United States Air Force and Civil Service Personnel and caused the same to be delivered by an agent of the United States, Mr. Robert M. Sefranka, and that such demand and request for said witnesses was denied by the United States Air Force and the Civilian Personnel Director of the Air Force Academy.

Further, Affiant says not.

IRVING P. ANDREWS

Subscribed and sworn to before me this 14th day of February, 1963 by Irving P. Andrews.

ROBERT C. RHONE, JR.
Notary Public

(SEAL)

My commission expires October 7, 1964.

EXHIBIT C

Affidavit

STATE OF CALIFORNIA }
COUNTY OF SAN DIEGO } ss.

I, Curtis L. Stevens, being duly sworn according to law, depose and say that I presently reside at 2634 Island Avenue, San Diego 2, California; that during the year 1959 I served as an Airman second-class in the United States Air Force and was assigned for duty at the United States Air Force Academy; that on April 24, 1959, I was summoned by the authorities at the Air Force Academy to a conference which I later learned was considered a preliminary investigation with reference to proceedings instituted at that time for dismissal of Daniel Alton Williams, a civilian employee at the Air Force Academy; that the following persons were present at that meeting: Josephine Dillon, Assistant Director of Civilian Personnel, Air Force Academy; Captain Roger P. Fox, Provost Marshal, Air Force Academy; and Robert M. Sefranka, Investigator, U. S. Civil Service Commission; that at said investigation, I was interrogated concerning my knowledge as to the charges made against Mr. Williams, and at the request of Mr. Sefranka, I signed an Affidavit summarizing a part of my testimony given in the presence of the three persons above named; that on or about the 29th day of April or immediately thereafter and before May 5, 1959, I was again summoned to a meeting or investigation before the Air Force Authorities; I was advised at the time by Captain Fox that the Affidavit executed by me on April 24, 1959, would be adequate for the purposes of the hearing on May 5, 1959, and that my personal appearance there would not be necessary. I remained at my usual duty assignment on May 5, 1959 and did not attend the hearing set on that day.

CURTIS L. STEVENS
Curtis L. Stevens

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No. 135

In the Supreme Court of the United States

October Term, 1962

Dennis Avery Williams, Petitioner

v.

Eugene M. Zuckert, Secretary of the Air Force, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
JOHN W. DOUGLAS,
Assistant Attorney General,
HOWARD E. SHAPIRO,
Attorney in the Solicitor General's Office,
ALAN S. ROSENTHAL,
DAVID L. ROSE,
Attorneys,
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Washington 25, D.C.

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680217—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 133

DANIEL ALTON WILLIAMS, PETITIONER

v.

EUGENE M. ZUCKERT, SECRETARY OF THE AIR FORCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO PETITION FOR REHEARING

From the beginning of this case, petitioner's primary contention has been that the Air Force had an obligation to produce for confrontation and cross-examination at the Civil Service hearing the witnesses whose affidavits supplied the factual basis for his removal (Pet. Br. 5). The Court, in dismissing the writ as improvidently granted, squarely rejected this contention. It recognized, however, that circumstances might arise where the Air Force, although permitted to proceed by written statements, would be obliged to produce witnesses for examination by the employee. The Court defined such circumstances by reaffirming first that "the party desiring the presence of wit-

nesses, either for direct or cross-examination, shall assume the initial burden of producing them" (371 U.S. at 532). The Court then stated that, if an employee "discharged this burden by timely attempt to obtain the attendance of the desired witnesses and through no fault of his own failed, then * * * the Air Force would have been required, upon proper and timely request, to produce them, since they were readily available and under the Air Force's control" (371 U.S. at 532–533).

Thus the Court's opinion develops two propositions. Although both use the ambivalent expression "production of witnesses," the distinction between them is important. The first proposition has to do with the "production" of live witnesses as part of the case to be made by the discharging agency. The Court held that the controlling statutes and regulations do not impose that duty. The second proposition has to do with the Air Force's obligation to "produce" witnesses, in the sense of enabling the discharged employee to call them, by exercising its authority or influence over enlisted men under its control.

Until the petition for rehearing, petitioner built his case under the first head, arguing that the employing agency had a duty, as part of its own case, to produce live witnesses. Having failed on this ground, petitioner now abandons his former contention and attempts to show that his case falls within the second proposition as defined by the Court in its *per curiam* dismissal. On the basis of new materials which were not in the record before the Court, petitioner now argues essentially that he brought himself within the

Civil Service regulations as interpreted by this Court, by making a request for the production of the witnesses in an affidavit given to a Civil Service investigator seven days prior to the hearing. We submit that the petition for rehearing should be denied, *first*, because petitioner, upon his own statement, did not discharge his "initial burden," and, *second*, because petitioner is attempting to introduce a new theory upon petition for rehearing different from that on which he presented his case in the trial and appellate courts and, requiring the resolution of disputed questions of fact upon evidence not before the Court.

I.

THE FACTS ALLEGED BY PETITIONER ARE IRRELEVANT BECAUSE HE NEVER REQUESTED THE WITNESSES TO APPEAR AT THE HEARING

Assuming for the moment that the facts are correctly stated in petitioner's supplementary affidavits, they do not establish a legal basis for relief under the Court's decision, for he never assumed the "initial burden." Petitioner never attempted to reach the witnesses to arrange for them to appear. The opinion of the court of appeals states (R. 101):

> Appellant concedes he did not request the three Airmen to attend the hearing; he concedes he does not know whether, if asked, they would have attended or if they attended how they would testify. Appellant has thus failed to use available administrative means to arrange for the appearance of witnesses as provided by the Civil Service Commission Regulations. * * *

The petition for rehearing in no way challenges these facts.

Thus, on the facts, *as petitioner concedes them to be,* there is no ground for rehearing or for further proceedings in any court in this case. Petitioner has argued the case on the assumption that he was entitled either by regulation or statute or under the Constitution to a trial-type proceeding before the Civil Service Commission and that it was the Air Force's duty to produce live witnesses as part of its case.[1] Consistent with that position, petitioner never requested the three witnesses to attend the hearing but contented himself with a demand that the Air Force produce them for confrontation and cross-examination. Petitioner never assumed the "initial burden" which the regulations placed squarely upon his shoulders and which this Court upheld as valid in its opinion dismissing the writ. Under the circumstances, the facts which petitioner has attempted to place before the Court since its decision are legally

[1] That this was petitioner's view of the case is confirmed by the letter he addressed to the Court on the day following the oral argument which states:

"3. The government's brief points out that the Commission has interpreted its regulations as allowing "the removing agency to rest its case on written statements and to impose on the appealing employee the burden of making his own arrangements for the appearance of all witnesses he wishes to present, including witnesses who have supplied evidence adverse to him" (Res. Br. 22–23). The issue is whether that interpretation, which was followed in this case (R. 100–101), violated Section 14 of the Veterans Preference Act, 5 U.S.C. § 863, and the applicable Civil Service regulations, 5 C.F.R. § 22.601, *et seq.*"

irrelevant and call for no change in the disposition of the case.

II

THE PETITION FOR REHEARING IMPROPERLY ATTEMPTS TO INTERJECT A NEW THEORY DIFFERENT FROM THAT ON WHICH PETITIONER PRESENTED HIS CASE IN THE TRIAL AND APPELLATE COURTS AND REQUIRING THE RESOLUTION OF DISPUTED QUESTIONS OF FACT UPON EVIDENCE NOT IN THE RECORD

In view of petitioner's attack upon the representations made by the Solicitor General on behalf of the United States, we have made a careful investigation of the circumstances known to government personnel concerning the absence of live witnesses from the hearing. The investigation makes it apparent that petitioner's belated claim that the government failed in its duty to assist him to call the witnesses not only interjects an issue not raised on the record, but also would involve the detailed analysis and drawing of inferences from a substantial body of evidence none of which was in the record before the Court. The investigation convinces us that petitioner never made any request upon the Air Force directly, and no request indirectly, that gave fair notice that he wished the Air Force to assist in the obtaining of witnesses whom he desired to call at the trial. It would lead us, on a trial of the facts, categorically to deny some of the facts alleged in the petitioner's affidavits and to challenge the interpretation he puts upon the incidents. The Court, however, need not, and should not be called upon to determine whether our conclusion is correct. For the fact is that petitioner's

present theory, that the government failed in a duty to help him get witnesses whom he wished to call, is a departure from everything preceding.

Throughout the proceedings in this Court, it has been the position of the Air Force, stated in the briefs (Br. in Op. 7–9; Br. 14–15, 17–21) and in oral argument, that the Civil Service regulations required petitioner to make his "own arrangements for the appearance of witnesses" (5 C.F.R. 22.607), that he did not request the witnesses to attend the hearing, that the Air Force raised no impediments to their appearance[2] and that, therefore, he was entitled to no relief. As pointed out above, the affidavits filed as part of the petition for rehearing do not in any way dispute the facts on which we relied in taking this position.

At the oral argument, a number of questions were raised as to the position which the Solicitor General would have taken had different facts been presented. In elaborating on the answers to such questions, the

[2] Petitioner urged in his brief (Br. 2) and in oral argument that he did not avail himself of the opportunity offered for a personal appearance before the Office of Civilian Personnel (R. 17) and was otherwise hampered in the presentation of his case because the Provost Marshal had issued an order excluding him from the base (R. 18–19). At the oral argument we pointed out that petitioner was represented by counsel who was free to enter the base. In the course of our recent inquiry into the extra-record circumstances, we have learned that the order excluding him from the base was modified in order to allow petitioner access to the Civilian Personnel Office for the purpose of seeking advice or replying in person to the notice of removal. Petitioner was officially informed of this modification of the suspension order by a representative of the Academy.

Solicitor General, on the afternoon of the oral argument, filed a letter with the Clerk of the Court stating in pertinent part:

> 1. Under the Veterans Preference Act and the applicable Civil Service regulations, the employing agency has no obligation to call witnesses to make its case in support of a discharge. The employing agency may rely upon affidavits. The governing regulations make it the obligation of the discharged employee to arrange for the presence of such witnesses as he may desire.
>
> 2. An employing agency could not lawfully place any impediments in the way of the discharged employee's arranging for the presence of any witness. Under the announced policy set forth in its regulations the Air Force would not have stood in the way of the appearance of the witnesses in question, and at the request of the discharged employee it would have facilitated their appearance.
>
> 3. The Air Force raised no impediments in the present case. Petitioner did not attempt to communicate with the witnesses or request the Air Force to produce them prior to the hearing.
>
> 4. The Air Force regulations and statements of policy give me every reason to believe it would have required the three men in question to appear if the petitioner had requested it to do so.
>
> 5. Under some circumstances it is possible that a discharged employee might request a witness who has given an affidavit against him to appear for cross-examination; the witness

might refuse; the employing agency (unlike the Air Force) might be unable or unwilling to take action and the discharged employee might then request the Commission's Examiner to disregard the affidavits. The present case does not raise this problem. The Civil Service Commission has never had occasion to decide what course the statute, regulations and applicable principles would require it to follow in these circumstances. Under such circumstances, it would seem improper for me to make any representation to the Court at this stage concerning the government's position if such a case were to arise.

The petition for rehearing takes issue with paragraphs three and four of this letter. In so doing, it relies upon an affidavit of petitioner dated April 28, 1959, as well as affidavits executed in February 1963—following the Court's dismissal of the case—by petitioner's counsel and by Curtis L. Stevens, one of the Airmen whom petitioner wished to examine at the Civil Service hearing. In the affidavit of April 28, 1959 (Pet. Reh. 5–7), which was executed as part of the Civil Service investigation of the case, petitioner stated, *inter alia:*

> * * * I further request that the good faith of the employing agency be demonstrated by presenting SSGT Alton Tyler at the hearing before the Hearings Examiner for cross-examination on May 5, 1959 at 9:00 A.M. since the said Tyler is under the jurisdiction of the employing agency and subject to its commands as a military person, which power to require

his attendant [sic] is not available to me by subpoena or available to the commission.

* * * * *

It is further requested that A 2c Patrick J. Ryan and A 2c Curtis L. Stevens also be present at the hearing scheduled May 5, 1959 at 9:00 A.M. on the same grounds as herein asserted for the presence of SSGT Alton Tyler.

Petitioner's counsel, Irving P. Andrews, states in his affidavit that on April 28 he "formally requested [the Civil Service investigator, Mr. Robert M. Sefranka] to convey, personally, the [petitioner's] affidavit * * * to the appropriate officials of the Air Force Academy * * *" (Supp. 1a). Mr. Andrews states further that some time between April 28 and prior to May 5, the day of the Civil Service hearing, Mr. Sefranka advised him "by telephone that the demand for the production of witnesses had been rejected by Captain Roger P. Fox, Provost Marshal and spokesman for the Superintendent of the Air Force Academy, and Mrs. Josephine Dillon, spokesman for the Director of Civilian Personnel, Mr. James E. Dodson, had similarly negatived the [petitioner's] request" for the production of the alleged government witnesses (Supp. 1a–2a),[3]

[3] This statement is contrary to the facts stated by petitioner's counsel in his post-argument letter to the Court dated December 14, 1962. There, petitioner's counsel stated:

"Airmen Tyler and Ryan, who had furnished affidavits against petitioner (R. 71, 78, 91), were hostile witnesses and petitioner had no reason to know prior to the hearing that they would not appear."

In his affidavit, Airman Stevens states that on April 24, 1959, he met with Josephine Dillion, Assistant Director of Civilian Personnel of the Academy, Captain Roger P. Fox, Provost Marshal, and Mr. Sefranka and was "interrogated" concerning his knowledge of the charges against petitioner. He states that he "signed an Affidavit summarizing a part of my testimony given in the presence of these three persons."[4] Mr. Stevens also states that he was advised by Captain Fox at a later meeting that the affidavit "would be adequate for the purposes of the hearing on May 5, 1959, and that my personal appearance there would not be necessary" (Supp. 3a).

On the basis of these affidavits, petitioner's counsel argues that "the Solicitor General's post-argument representations" were in error and that he should now be accorded an opportunity to demonstrate that "he '[brought] himself within' the regulations as construed by this Court" (Pet. Reh. 4; Supp. 2). It should be noted that petitioner does not assert that any request was addressed by him or his counsel to the Airmen whom they wished to be present at the hearing. The claim is solely that such a request was made in the body of the April 28 affidavit given to the Civil Service investigator, that the investigator was requested to convey the affidavit to the Air Force officials and that some time prior to the hearing petitioner was advised by the investigator that the "demand" for the appearance of the witnesses had been rejected by Captain Fox and Mrs. Dillion.

---

[4] A copy of Mr. Stevens' affidavit is attached hereto as Appendix A.

Had all the alleged facts and petitioner's interpretation of them been known, the Solicitor General would (or at least, should) have framed paragraphs 3 and 4 of his letter differently. Those paragraphs were intended to refer to requests to have the three men present so that petitioner could call them as witnesses, the Air Force's lack of obligation to present a live case having been dealt with in paragraph 1 and the problem of making witnesses available for the petitioner to call as part of his case being taken up in paragraphs 2, 3, 4 and 5. It still seems, to us, although we may not be the most objective judges, that that is quite plainly the meaning of the paragraphs in question, and that it was, therefore, and is, an accurate statement in all respects. At the time the letter was written there seemed to be no occasion to focus upon the distinction between a request that the Air Force produce witnesses for petitioner to call and the very different request that the Air Force produce the men as its witnesses instead of relying on their affidavits. We had no information either from the Supreme Court record or the government's files that any request of any kind had been communicated to the Air Force prior to the hearing. The Air Force did not understand—quite rightly, we think—that petitioner had ever, even indirectly, requested it to assist him in calling the witnesses by producing them, *i.e.*, having them present *for him to call* at the hearing. See pp. 12–18 below. Since it now appears that a request that the Air Force produce live witnesses as part of its case was probably communicated to the Air Force through Sefranka, it is regrettable that we did not

focus on the distinction so that no possibility of misunderstanding could occur.

Following receipt of petitioner's post-argument affidavits, the Solicitor General undertook a full investigation to determine the relevant facts. The entire Civil Service files were reviewed. The Civil Service investigator, Mr. Sefranka, was brought from Albuquerque, New Mexico, for interview. The Air Force personnel named in the affidavits, Captain Fox, Mrs. Dillion and Mr. Dodson, were brought from Colorado.

For the Court's information, we state the facts disclosed by each of these witnesses. However, we emphasize that we do not concede either that this information detracts from the legal basis of the Court's holding (see Part I, *supra*) or that it is appropriate at this late juncture, after all appeal procedures have been completed, to retry this case on the basis of facts available to petitioner but not made a part of the record, and upon a theory which was not urged throughout the proceedings.

MRS. JOSEPHINE DILLION—

Mrs. Dillion was the Civilian Personnel Officer assigned to the Williams case. Prior to the Civil Service hearing on May 5, 1959, neither petitioner nor his counsel ever spoke to her. As far as she knows, neither petitioner nor his counsel attempted to communicate with her to discuss the charges or the production of witnesses at that hearing.

Although Mrs. Dillion signed a statement dated April 29, 1959, that she had "been advised of the evidence obtained in the investigation of the appeal of

Daniel A. Williams * * * as presented to me by a Civil Service Commission representative," she stated that she first saw petitioner's affidavit of April 28 in connection with this inquiry by the Solicitor General.

It was on the afternoon of May 4 that Mrs. Dillion first heard that petitioner wished the Air Force to present witnesses at the Civil Service hearing. She received a telephone call from Mr. Sefranka, who advised her that he was communicating for petitioner's counsel who had expressed a desire that the Air Force produce three Air Men at the hearing. She recalls stating that the Air Force might not be able to round up the men upon such short notice and asking Mr. Sefranka if their presence would serve a useful purpose since they had each given statements and whether production was being requested by the Commission. Mr. Sefranka replied that, as a Civil Service representative, he was required to remain neutral and was not in a position to advise her. He said that there was no official Commission request that the men be present.

After a conversation with her supervisor, Mr. Dodson, the Civilian Personnel Director, Mrs. Dillion telephoned the Civil Service Appeals Examiner, Mr. Charles W. Hoover, to advise him of the call received from Mr. Sefranka and to ask if the Commission was requesting the presence of the men. Mr. Hoover said that this was a matter left for decision by the Air Force and that the Commission did not encourage the bringing of witnesses unless they had something to add which was not included in the statements they had given to the investigator. Following this con-

versation, Mrs. Dillion and Mr. Dodson determined not to attempt to present the witnesses at the hearing. She did not communicate this decision to Mr. Sefranka, to petitioner or to his counsel, nor was she asked by anyone to do so.

CAPTAIN ROGER P. FOX—

Captain Fox was Provost Marshal of the Academy during the period in question. He participated in the investigation of the complaints which led to the charges against petitioner and to petitioner's removal on April 12, 1959. He attended the Civil Service hearing with Mrs. Dillion and answered questions. Prior to that time, he had never seen or spoken with petitioner or his counsel, Mr. Andrews.

Captain Fox recalls only one meeting with the Civil Service investigator, Mr. Sefranka. He cannot place the date. At this meeting, which was also attended by Mrs. Dillion, Mr. Dodson, a Captain Ryan and possibly a Mr. Baker of Dodson's office, there was no discussion or mention of the question whether the Air Force would produce witnesses at the Civil Service hearing. Captain Fox had no other conversations with Mr. Sefranka. He never discussed petitioner's affidavit of April 28 or the request contained therein with Mr. Sefranka or with anyone else. Captain Fox does not know whether he saw this affidavit prior to the hearing. Captain Fox, who is not an attorney, had no responsibility, either formal or informal, for decisions concerning the presentation of the Air Force's case against petitioner at the Civil Service hearing. He made no decision whether the

Air Force would produce witnesses and never discussed this question with Mr. Sefranka, petitioner or his counsel.

Captain Fox disagrees with the statements in the affidavit of ex-Airman Stevens. Captain Fox states that he did not attend a meeting with Mr. Sefranka and Mrs. Dillon at which Stevens was interrogated and signed an affidavit summarizing any portion of his testimony. Captain Fox states that he was not present when any statements were taken by Mr. Sefranka from anyone and that he took none himself in this case following the preferring of the charges against petitioner on or about March 11, 1959. Captain Fox had never seen Stevens' affidavit of April 24, 1959, prior to March 1963. Captain Fox states that it is inconceivable that he advised Stevens that this affidavit would be adequate for the hearing on May 5 and that his personal appearance would not be necessary. To have given such advice would have been wholly outside Captain Fox's responsibility as Provost Marshal.[5]

[5] It would not have been unreasonable for someone to have given such advice to Airman Stevens, since he stated in his affidavit (attached hereto as Appendix A):

"I have no personal knowledge of the alleged attempted assault and have no firsthand knowledge of the other incidences and charges contained in the letter of proposed adverse action.

"I have read the above statement consisting of one page which is true and complete to the best of my knowledge and belief."

Airman Stevens, who was interviewed by Mr. Sefranka at petitioner's request, was not a witness upon whose statements the Air Force relied. By his own admission under oath, he had no knowledge of the charges. It seems clear that under any interpretation of the regulations, the Air Force had no obligation to present this witness for cross-examination.

JAMES E. DODSON—

Mr. Dodson, Director of Civilian Personnel of the Academy at the time pertinent to this case, never spoke with Williams, his counsel, Mr. Andrews, or with any witnesses in this case prior to the Civil Service hearing. He had one conversation, irrelevant to the issues here, with Mr. Sefranka, and at no time advised him whether the Air Force would or would not produce witnesses at the Civil Service hearing.

Mr. Dodson recalls that Mrs. Dillion, prior to the Civil Service hearing, advised him that she had received a telephone call from Mr. Sefranka raising a question concerning the production of witnesses at the hearing. Mrs. Dillion stated that she hoped to clarify the Civil Service position by calling the examiner, Mr. Hoover. He gave Mrs. Dillion permission to make this call.

Mr. Dodson saw none of the affidavits obtained by Mr. Sefranka in his investigation of this case at any time prior to the Civil Service hearing.

ROBERT M. SEFRANKA—

Mr. Sefranka was assigned as an investigator to this case on April 16, 1959. He completed his investigation of the case on April 30. Mr. Sefranka was normally assigned as investigator to thirty or forty cases at one time.

On April 23, Mr. Sefranka met with petitioner and his counsel at the latter's office to afford them an opportunity to review the affidavits which he had obtained to date. Petitioner executed an affidavit.

On April 24, Mr. Sefranka interviewed Airman Stevens at the request of petitioner. Captain Fox was not present at this interview.

On April 28, Mr. Sefranka met again with petitioner and his counsel at the counsel's office. Counsel, in Mr. Sefranka's presence, dictated a statement which petitioner signed under oath and which has been filed as Exhibit A to the petition for rehearing. Mr. Sefranka recalls no formal or informal request that he convey this affidavit personally to the officials of the Air Force, although he states that this would have been his regular procedure since it was his responsibility to disclose to all parties the affidavits obtained in the course of his investigation.

The following day, Mr. Sefranka made the affidavits he had obtained from petitioner and other witnesses available for review by Air Force personnel. He did not mention the request that actual witnesses be presented, which was contained in the body of the Williams affidavit. On April 30, Mr. Sefranka met once more with petitioner and his counsel. Petitioner executed a further affidavit responding to Mrs. Dillion's affidavit of April 29, but made no mention of a desire for witnesses. Petitioner's affidavit is attached hereto as Appendix B.

Mr. Sefranka recalls; at some point prior to the Civil Service hearing, a discussion with petitioner and his counsel concerning th production of witnesses by the Air Force. He advised them that the Commission had no subpoena power, that the Air Force was

not required to produce witnesses, that the Commission could not force it to do so, and that arrangements for the production of witnesses should be made between the employee and the employing agency.

Mr. Sefranka does not recall telephoning petitioner's counsel to advise him that his request concerning witnesses had been rejected. He does recall a discussion at some time prior to the hearing in which he informed Air Force personnel that petitioner and his counsel desired the Air Force to produce certain witnesses. He recalls that the Air Force made a point of the fact that one of the witnesses was no longer at the Academy. He advised the Air Force officials that it was within their discretion whether to produce witnesses and that they were not required to do so; but he gave no advice as to whether they should comply with the request. He does not recall whether the Air Force advised him whether or not they would produce witnesses at the hearing.

* * * * *

Taking all the non-record evidence now available in the light most favorable to petitioner, we believe that it reveals that he executed an affidavit for the Civil Service investigator in which he requested the Air Force to present certain witnesses; that he never directly communicated with any Air Force personnel to request it to aid him to obtain the witnesses; and that he did not in any way intimate (which would be contrary to fact) that he, himself, had been unable to procure their attendance at the hearing. This non-record evidence reveals further that the Air Force,

when advised of petitioner's desire for witnesses, quite naturally regarded this as a request that it present at least a portion of its case through live witnesses. Being uncertain as to its obligations in this regard, the Air Force personnel asked advice from the Civil Service investigator and the examiner, each of whom, consistent with regulations approved by this Court in the opinion in this case, advised that there was no such requirement.

The interpretation which Mrs. Dillion and, indirectly, Mr. Dodson placed upon Williams' request was entirely natural. Williams' affidavit complained that the affidavit of Sgt. Tyler (Pet. Reb. 5)—

> is totally irrelevant and prejudicial in that the alleged report made by said affiant was hearsay to me * * *.

He then went on to request that—

> the good faith of the employing agency be demonstrated by presenting SSGT Alton Tyler at the hearing before the Hearings Examiner for cross-examination * * *.

pointing out that Tyler was under the jurisdiction of the employing agency and not available to him by subpoena or other commission. There is no suggestion that Williams had requested Tyler to appear and no explicit statement that he desired to call him as a witness. Whatever may have been Williams' subjective intent, Mrs. Dillion and the Air Force authorities certainly acted reasonably in understanding that their duty to present the evidence through live witnesses was the only thing in question and the only matter being urged.

As we have stated before to this Court, we believe that if petitioner or his counsel had advised the officials of the Air Force that they could not reach the Airmen whom they wished to examine at the hearing or needed other assistance in obtaining their presence, the Air Force would have readily given such assistance. Any other action would be contrary to the Air Force Regulations (32 C.F.R. 804.403) which specifically provide:

> § 804.403 *Air Force policy.*
>
> Official information will be made available for use in litigation, and military and civilian personnel will be permitted to testify concerning such information in its files if material and relevant to the litigation, unless the information is classified defense information, is privileged by law or regulation, or other valid reason exists for its nonrelease.

Further, the Air Force has no policy to deny discharged employees an opportunity for confrontation and cross-examination of witnesses. In this very case, in accordance with its regulations, it had offered this petitioner an opportunity for review of his removal under the grievance procedures established by Air Force Manual 40–1, Chapter E2. This chapter specifically provides that the employee may inform the Air Force of the names of witnesses he wishes to examine and the Air Force will, in the case of Air Force employees, require them to be present.[6]

---

[6] Paragraph 10 of Air Force Manual 40-1, which establishes the grievance procedures, states:

* * * * * *

"g. The committee has no authority to compel witnesses to give testimony. However, if necessary to insure adequate presenta-

Neither the Supreme Court record nor the extra-record materials reviewed by the Solicitor General indicate any unwillingness to aid petitioner in procuring any witnesses whom he wished to call. Rather, the Air Force was proceeding, as petitioner himself has recognized in his letter of December 14 to this Court (see *supra*, p. 4, n. 1), in the belief that it was permitted by Civil Service regulations to rely on written statements and to leave to the employee the responsibility for making his own arrangements for the appearance of witnesses he wished to present.

As stated above, we believe that it is not incumbent upon this Court to analyze affidavits and statements of what witnesses would say upon an issue that was never presented in the courts below, nor in this Court prior to the petition for rehearing. If there were a clear-cut showing of injustice, perhaps the error could be corrected, however late. But petitioner does not make such a showing. He was advised by counsel throughout (see R. 27). He never claimed that the

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tion of testimony for either the complainant or the person complained against, the committee will request appropriate administrative authority to require the attendance of Air Force employees as witnesses.

"h. The committee may entertain a request from the complainant and other persons giving testimony to call other witnesses in addition to those originally produced. If this request is made, the committee may require an explanation of the purpose and the basis for the request and an indication that the testimony of the witness or witnesses requested will be competent, relevant, and material to the case. The committee, in its discretion, may decide not to call any additional witness if it considers the action unnecessary to a fair consideration of the grievance or otherwise impracticable for clearly demonstrable reasons."

See also p. 4, fn. 2, of the brief for the respondents.

Air Force failed to respond to a request for assistance in procuring the attendance of witnesses whom he wished to call. The latter question was suggested only when the government, in an effort to define exactly the case before the Court, indicated that the Air Force would have rendered such assistance if it had been requested. The suggestion that such a request was in fact made and refused is far too tenuous to entertain at this late stage in the case.

Since petitioner chose not to assume the initial burden of attempting to reach the witnesses and to arrange for their appearance, he did not bring himself within the regulations. There was, therefore, no violation of his rights and no unfairness.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for rehearing should be denied.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

STEPHEN J. POLLAK,
Assistant to the Solicitor General.

ALAN S. ROSENTHAL,
DAVID L. ROSE,
Attorneys.

MARCH 1963.

APPENDIX A

Affidavit

STATE OF COLORADO
County of El Paso
City of Colorado Springs

I, *Curtis L. Stevens, Airman Second Class,* of the United States Air Force Academy, being duly sworn, make this statement of my own free will, without any promises or assurances:

Reference to letter of proposed adverse action dated March 11, 1959 addressed to Daniel A. Williams of 607 North Spruce Street, Colorado Springs, Colorado, and to specific charge contained therein dated February 11, 1959, of an attempted homosexual assault of A/2C Patrick J. Ryan at 607 North Spruce Street, Colorado Springs, Colorado. I was present at the above address on the night of February 11, 1959 and I was present when a telephone call was made and Mr. Williams told me that it was Airman Ryan who wanted to come over and later during the evening Airman Ryan arrived. About the time Airman Harris and myself were about to go, Airman Ryan made a statement to the effect that he would like to remain longer to discuss a business deal concerning the selling of a Presto-Pride cook wear. Airman Harris and I departed and Airman Ryan remained. I have no personal knowledge of the alleged attempted assault and have no first hand knowledge of the other incidences and charges contained in the letter of proposed adverse action.

I have read the above statement consisting of 1 page, which is true and complete to the best of my knowledge and belief. I further understand that the information I have given is not to be considered confidential and that it may be discussed with or shown to the interested parties.

Curtis L. Stevens
CURTIS L. STEVENS, *A/2C, USAF Academy*

Subscribed and sworn to before me at Colorado Springs, Colorado, this 24th day of April, 1959.

Robert M. Sefranka
ROBERT M. SEFRANKA, *Investigator,*
U.S. Civil Service Commission

APPENDIX B

Affidavit

STATE OF COLORADO
County of Denver ,

I, Daniel Alton Williams, residing at 1830 East 39th. Avenue, Denver, Colorado, being duly sworn; make this statement of my own free will, without any promises or assurances:

I have been advised of the evidence obtained in the investigation of my appeal under Section 14 of the Veterans' Preference Act of 1944, as presented to me by a Civil Service Commission representative. I have no further evidence to present except, objections to the consideration of the affidavit of Mrs. Jean DeSmet, on the grounds that the same is not evidentiary in nature but is in essence argument, and same objection is hereby made to affidavit of Josephine L. Dillion, dated April 29, 1959.

I have read the above statement consisting of 1 page, which is true and complete to the best of my knowledge and belief. I further understand that the information I have given is not to be considered confidential and that it may be discussed with or shown to the interested parties.

Daniel A. Williams
DANIEL ALTON WILLIAMS.

Subscribed and sworn to before me at Denver, Colorado, this 30th. day of April, 1959.

Robert M. Sefranka
ROBERT M. SEFRANKA, *Investigator,*
U.S. Civil Service Commission.

U. S. GOVERNMENT PRINTING OFFICE: 1960